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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA:

BY PEACHY R. GRATTAN.

VOL. XI.

FROM APRIL 1, 1854, TO JANUARY 1, 1855.

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SECOND EDITION.

RICHMOND:
J. H. O'BANNON, SUP'T PUBLIC PRINTING,
1892.

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OF THE
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DURING THE TIME OF THESE REPORTS.

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CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

Richmond.

UPPER APPOMATTOX CO. v. HARDINGS.

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A proceeding has been instituted under the 9th section of the act of February 23d, 1835, Sess. Acts, p. 82, in relation to the Upper Appomattox Company, for the purpose of recovering damages to land occasioned by the improvement of the company. The jury have returned their verdict ascertaining the damages; and the company has filed exceptions, and obtained a continuance of the cause; and then the plaintiff dies. **HELD:**

1. The proceeding may be revived by the proper party against the company.
2. The administrator, and not the heirs of the plaintiff, is the proper party to revive the proceeding.

The case is fully stated in the opinion of Judge *Allen*.

Steger, for the appellants.

There was no counsel for the appellees.

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ALLEN, P. The case of *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, decided that the proprietor, whose lands were injured by the erection of a dam across the river, might sue out the writ of *ad quod damnum*, authorized by the 9th section of the act of February 23d, 1835, Sess. Acts, p. 82, although no previous writ to condemn land for the abutment and other purposes had been sued out by the company. This was a proceeding under the 9th section of said act, for the purpose of ascertaining and assessing damages alleged by Elizabeth Harding to have been sustained by her in consequence of the erection of a dam by the company, occasioning the water to back up and rise and remain higher, along her low grounds on the river, than it would have done but for the dam; whereby she was unable to drain her low grounds, and the water in the creeks, branches and ditches was prevented from passing off freely into the river, occasioning accumulations of sand, whereby said creeks, &c., were more liable to overflow, and the lands thereby rendered more subject to inundation and of less value; and that such damages were never foreseen or estimated by the jury impaneled when the dam was erected, and had never been satisfied, in any way.

An inquisition was taken on the 2d of June 1841, assessing the damages to five hundred dollars; which being returned to the County court, the appellants filed exceptions to the writ and inquest, and moved to quash the same; and the motion was continued at their instance. At a subsequent term the death of the plaintiff in the writ was suggested; and on motion of George M. Harding, her administrator, a *scire facias* was awarded to revive the cause in his name, as administrator as aforesaid. At a subsequent term, on the motion of said George M. Harding and others, the heirs of said Elizabeth Harding, it was ordered that the order awarding the writ of *scire facias* to revive in

the name of said George M. Harding, as administrator, should be set aside; and, on motion of the heirs, a writ was awarded to them to revive the cause in their names. Upon the return of this writ the appellants appeared and demurred thereto. The County court overruled the demurrer; and after hearing the testimony, overruled the motion to quash the writ and inquisition, and entered judgment in favor of the heirs for the damages assessed: The judgment being affirmed by the Circuit court, the appellants have appealed to this court.

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Two questions are presented by the appeal: First, Whether the case could be revived at all? And secondly, If it could be revived, whether the revival should be in the name of the personal representative or the heir at law.

If this had been an action on the case for a nuisance to the freehold of the plaintiff below, the rule that *actio personalis moritur cum persona* might have applied; for such causes of action died with the person. 1 Wms. Saund. 217, n. 1; *Harris v. Crenshaw*, 3 Rand. 14. And although the 64th section of the statute, 1 Rev. Code, p. 390, was an extension of the statute *de bonis asportatis*, 4 Ed. 3, ch. 7, so as to embrace actions brought against, as well as those brought by, executors and administrators, it has not been construed as extending to injuries done to the freehold or to the person. The cause of action in such a case imputes a *tort*; it arises *ex delicto*; the plea must be not guilty; and if either party died before verdict, the action could not be revived.

But it seems to me the rules applicable to an action on the case for a nuisance do not apply to this proceeding. The legislature, by the act under consideration, section 2, authorized and required this company to construct dams on the river, from the head of their canal near Petersburg to the town of Farmville, so as

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to afford a navigation of two feet depth of water at all seasons of the year. To comply with this requisition it was necessary to take private property in some instances absolutely; and to subject it in other instances to a charge or easement materially impairing its value. By this law, the *jus publicum* in the navigation of this stream has been conferred on the company for the purpose of improving the navigation; and such being the case, private rights must yield to the public, upon just compensation being made. As was remarked by President Tucker in the *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh 42, 74, "It may be truly said that this *jus publicum*, this eminent domain, is the law of the existence of every sovereignty"; and "though the sovereignty has granted its land, or its privileges, without any express reservation to take them for public uses, yet that right is necessarily implied." As every proprietor holds subject to this public right, and as the legislature, in the exercise of the right of eminent domain, can alone prescribe the mode of making just compensation, it cannot be said that a wrong is done to the owner when such compensation is reserved for him, and a mode prescribed for ascertaining the amount and securing its payment. So far from assimilating it to a proceeding for a *tort*, and to be treated like a cause of action which arose *ex delicto*, it may more properly be likened to a cause of action arising *ex contractu*; as growing out of the implied obligation to surrender to the public use, upon the engagement of the public to make just compensation.

In the law under consideration, the right is conferred on the company to acquire private property by purchase, and to settle by contract any damages which their works might occasion to adjoining lands; or if they could not agree with the proprietor of the lands necessary for abutments, or which may probably be damaged or affected, the 8th section required them to

take out a writ of *ad quod damnum*; and upon paying the value of the lands located for abutments, and the damages assessed, and costs, the law declares the company shall become seized in fee simple of the lands used for the abutments, and be authorized to erect the dam. Whether the company adopts this course, or by purchase and agreement with the proprietors acquires the necessary land for abutments, and settles by contract the probable damages, in either event, the 9th section of the act gives a remedy to the proprietor who sustains damages not foreseen, estimated, and satisfied. In this proceeding the right to erect the dam, or the legality of the dam when erected, is not in contest. It cannot be treated as a nuisance; and the whole effect is to ascertain the extent to which the individual has been required to surrender private property for public uses, upon the undertaking of the public to make just compensation, and to fix and assess the amount of such compensation. Under the general law in regard to mills, it was not essential to give judgment for the amount so ascertained before the court could give leave to erect the dam; the leave to erect the mill being valid, though no order was made directing the payment of damages; but the payment of such damages to the persons entitled is imposed by law as a condition to protect the party against the suit of the person injured. *Coleman v. Moody*, 4 Hen. & Munf. 1; *Anthony v. Lawhorne*, 1 Leigh 1. Under the 8th section of the law under consideration, no provision is made requiring the court to give judgment for the value of the lands and damages assessed. The inquest was to be returned and recorded, and upon payment of the sums assessed the company became seized of the lands and was authorized to erect the dam.

The 9th section had reference principally to injuries which were made apparent by the erection of the

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dam, and therefore not foreseen by the jury where there had been a jury, or settled by contract with the proprietors. As payment was not necessary to protect the company from the suit of the party injured, as in the case of the damages assessed under the preceding section before proceeding with the works, this section provides that the jury shall enquire of and assess the damages; and thereupon the person suing the writ shall be entitled to the damages and costs, and the court shall enter judgment for the same. The right of the proprietor grows out of the appropriation of his property; and the statute provides a cheap and expeditious mode to ascertain the amount of his compensation, and to enforce the payment. I do not think that the rule in relation to actions *ex delicto*, for injuries to the freehold, applies to this proceeding, but, on the contrary, that it may be revived in the name of the representative entitled to the compensation.

But it seems to me the personal representative, and not the heirs, was the party entitled to receive the amount of the compensation assessed, and to revive the proceeding for the purpose of getting judgment and execution.

The property taken or subjected to the easement in favor of the company belonged to the intestate. Her lands were rendered more liable to inundation, and the permanent value impaired to that extent, during her life time. The easement was imposed, and the right to compensation arose, as soon as the extent of the reflow was made manifest by the erection of the dam; and from the time that the proprietor provided for in this 9th section evinced a determination to claim the compensation for the loss, by instituting his proceeding under this act to have the amount ascertained, the claim became a personal demand; as much so as it would have been if the damages had been assessed and the inquisition returned and recorded, as provided

for in the 8th section. The act declares that the jury shall assess the damages, and thereupon the person suing the writ shall be entitled to the damages. The damages for permanent injuries, such as those set forth in the writ, can be assessed but once. Having once obtained compensation to the extent that the property has been impaired in value by the easement, he cannot recover again for the continuance of the easement. The heir inherits and holds the land subject to this easement as long as the dam is legally continued; and cannot recover that which never descended upon him. It is like the action on a covenant of seizin for eviction or breach in the life time of the ancestor. There the action survives to the personal representative, because, as was said in *Lucy v. Levington*, 2 Levinz 26, the eviction being to the ancestor, he cannot have an heir to this land.

Nor do I conceive that this can be changed by the action of the administrator. It appears from the recitals in the order of the County court, that he was one of the heirs uniting in the motion to set aside the order awarding the writ of *scire facias* to revive in the name of the administrator, and awarding the writ to revive in the name of the heirs. The *scire facias* to revive was intended to continue the action in the name of the representative, who legally succeeded to the rights of the intestate. New parties, having no claim to intervene in the controversy, cannot be permitted to take the place of the proper representative to continue the controversy and to collect the money. It would be the institution of a new proceeding instead of a continuance of the old. The heirs, as such, have no right to the subject; it is assets to be paid out and distributed in the due course of administration. I think, therefore, the demurrer to the *scire facias* should have been sustained; and that the order made on the 3d of July 1843, setting aside the previous order

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awarding a *scire facias* to the administrator to revive the cause in his name, and awarding a *scire facias* to the heirs to revive the cause in their name, should be set aside, and leave given to the administrator of said Elizabeth Harding to sue out a *scire facias* to revive the cause in his name; and for further proceedings.

MONCURE, LEE and SAMUELS, Js. concurred in the opinion of ALLEN, J.

DANIEL, J. dissented.

JUDGMENT REVERSED.

Richmond.

FRAZER'S *adm'r* v. BEVILL & *als*.1854.
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1. Executors or administrators with the will annexed, who are legatees of slaves under the will, agree to a division of the slaves, and each takes possession of those allotted to him. This is an assent to the legacies by the executors or administrators.
2. To one of these legatees the slaves are given for life, and if he should die without heirs, then over to a grand son of the testator. The assent to the legacy in favor of the first taker is an assent in favor of the contingent legatee over.
3. In a suit by the contingent legatee against the legatee for life, and a purchaser of one of the slaves under an execution against him, the other administrator is a competent witness for the contingent legatee, to prove the division of the slaves, and the assent to the legacies by the administrators.
4. The fact that the slave was sold to satisfy a debt which was originally the debt of the testator, but upon an execution issued on a forfeited forthcoming bond given by the administrator, he having ample assets in hand as administrator to pay it, does not entitle the purchaser to hold the slave in absolute property, free from the claim of the contingent legatee.
5. The purchaser claiming the slave and her increase as his own property, and the legatee for life never having had any children, it is the right of the contingent legatee to apply to a court of equity, and to require the purchaser to give security to have the slave and her increase forthcoming at the death of the legatee for life without issue.
6. *Quære*: When an executor may, and when he may not, retract his assent to a legacy.
7. *Quære*: Whether a party may set up, in a second suit, pretensions inconsistent with the allegations of his bill and his pretensions in his first suit.

Frederick Reese, of the county of Dinwiddie, died in 1829. By his will, which was duly admitted to probat, after a legacy of two hundred and fifty dollars to Amy Featherston, he gave to his son, Herbert Reese, all his land, and one-half of the balance of his estate:

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But if he should die without heirs, then at his death the land, with all the other property, should go to his grand son, Frederick A. Frazer, and his heirs. The testator gave to his daughter, Martha Frazer, the remaining half of his personal estate. Herbert Reese and Martha Frazer qualified as administrator and administratrix, with the will annexed, and gave separate bonds.

In 1830 a judgment was recovered against the personal representatives of Frederick Reese, which, principal, interest and costs, amounted to one hundred and thirty-six dollars and sixty-six cents; one-half of which was paid by Martha Frazer. Upon the execution which issued upon this judgment Herbert Reese gave a forthcoming bond, with Price Pollan as his surety; which bond having been forfeited, an execution was awarded thereon, and was levied on a slave named Eliza found in the possession of Herbert Reese, and which had been a part of the estate of Frederick Reese. This slave was sold by the sheriff under the execution, and was purchased by Archer J. Bevill. At the time of this sale, as appeared by the accounts of the administrators settled by the court of probat, Herbert Reese was a debtor to the estate, after crediting him with the payment of one-half of this judgment, in the sum of two hundred and twenty-eight dollars and forty-two cents, and Martha Bevill was debtor in the sum of sixty-five dollars and eighty-five cents. These accounts showed that the testator was very little indebted at his death.

In 1845 Frederick A. Frazer filed his bill in the Circuit court of Dinwiddie, in which he set out the will of Frederick Reese; and stated that the administrators sold the personal estate except the slaves, which proved more than sufficient to pay the debts; that the slaves were divided, as directed by the will, between Herbert Reese and Martha Frazer, and that

the slave Eliza fell to the share of Herbert Reese; that she had been sold to Bevill and had since had several children. That Bevill claimed a fee simple in said slave and her increase; and had avowed his purpose to use and control, sell and dispose of the said slaves as he thought proper; and claimed an absolute right to them. That plaintiff was apprehensive, and with good reason, that Bevill would send the slaves out of the state, or sell them to a trader to be taken away, so that the plaintiff would be entirely without remedy upon the happening of the contingency upon which his interest depended; a contingency very likely to occur, as Herbert Reese was then, and had ever been, childless. And making Bevill, Herbert Reese and Martha T. Frazer parties defendants, he prayed that Bevill might be restrained from sending the slaves out of the state; that he might be required to give bond and security to have the slaves forthcoming at the death of Herbert Reese; and for general relief.

The bill having been sworn to by the plaintiff, the court made an order restraining Bevill from removing the slaves beyond the jurisdiction of the court, or from anywise disposing of them until the further order of the court: And directed that unless Bevill should enter into bond with good security, in the penalty of eight hundred dollars, payable to the plaintiff, and with condition to comply with and perform the decree which the court might make in the cause, the sheriff should take the slaves into his possession, and put or hire them out to the best advantage till the further order of the court.

The bond was given by Bevill; and he then answered the bill. He said that at a sheriff's sale, made about the year 1830, he purchased the slave Eliza., then a small girl; that she had since had three children, and that they were all in his possession. That

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the slave was sold for the purpose of satisfying debts due from the estate of Frederick Reese; that judgments had been recovered against his personal representatives, executions issued thereon, and the said slave was levied on and publicly sold to satisfy them. That it was most remarkable that the plaintiff had delayed so long to assert his right, if any he ever had; that he had no new cause, for that he must still be postponed, if he could succeed, until the life estate was extinguished. That he was advised, and confidently believed, that the plaintiff had no shadow of title to the slaves mentioned in his bill, and then in possession of the defendant; and he considered himself most unnecessarily harassed by this suit. The other defendants did not answer.

The execution under which the slave Eliza was sold was filed, and the sheriff's return was, "Levied on one negro girl, held as the property of Herbert Reese." The deposition of the deputy sheriff who levied the execution was taken. He says he levied the execution on a negro girl named Eliza, who, he was told by Herbert Reese at the time, was the property of Frederick Reese's estate. He took her from the house and possession of Herbert Reese. That he offered the slave for sale at the June court, but that some of the legatees of Frederick Reese contended that Herbert Reese was bound for the debt himself; and that the negro ought not to be sold, as they would be scattered about at the death of Herbert Reese. That in consequence of these remarks no persons would bid, and he therefore kept her until July court, when she was again put up, and was sold. That Bevill was present at the June court when the objections were made. No objections were made at the July court, and Bevill purchased the slave at one hundred and seventy dollars. That at the sale it was publicly announced that she

was sold to satisfy an execution in favor of Martin Blake against Herbert Reese, administrator of Frederick Reese deceased.

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The deposition of Martha T. Frazer, the administratrix, was also taken and filed. She said, that in February 1829 a division of the slaves of Frederick Reese took place; and in that division six slaves, one of which was this slave Eliza, were allotted to Herbert Reese. That this division was made by consent of parties; and each took possession of the slaves allotted to him and her; and that she still had hers. This deposition was objected to by the defendant Bevill, on the ground that the witness was one of the personal representatives of Frederick Reese deceased.

The cause came on to be heard on the 31st of March 1847, when the court, without passing upon the objection to the competency of Mrs. Frazer as a witness for the plaintiff, dissolved the injunction and dismissed the bill. And the plaintiff having died after the decree, his administrator applied to this court for an appeal, which was allowed.

Macfarland and *Rhodes*, for the appellant.
J. Alfred Jones, for the appellee.

DANIEL, J. I do not think that the exception to the deposition of Martha T. Frazer was well taken. The fact that she was one of the administrators of her father's estate did not, of itself, render her incompetent to testify to the assent of herself and of her co-administrator to the legacy in respect to a portion of which the suit was brought.

In the case of *Smith & wife v. Townes' adm'r*, 4 Munf. 191, which was an action of detinue brought by a legatee against a stranger, for the purpose of recovering a slave bequeathed to the legatee, this court held that it was competent for the plaintiff to prove by the *executor*

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(if he had no objection to being examined) his assent to the legacy. I see nothing in the case under consideration to justify us in refusing to apply the same principle to the testimony of Mrs. Frazer. It is true that the recovery of the slaves in controversy from Bevill would be a satisfaction *pro tanto* of the claims of the appellant against the administrators for Frederick R. Frazer's share of the estate under his grand father's will; and Mrs. Frazer's testimony proves one of the important facts upon which the right to recover from Bevill must rest. Still, I do not perceive that Mrs. Frazer has any such interest in the event of the suit as can affect her competency as a witness. For even if the appellant, in the event of his failure to recover the slaves of Bevill, could be permitted to turn round and repudiate the grounds on which he sought that recovery, deny his own allegation of the assent of the administrators to the legacy, and seek to recover of the administrators on the ground of a *devastavit* or wrong, in improperly permitting a sale of the female slave Eliza, I do not see how Mrs. Frazer (from any fact disclosed in the record) could be subjected to any liability. Apart from her own evidence there is nothing to show that the slave Eliza had ever been in her possession. The other evidence in the cause shows that the debt, in satisfaction of which the slave was sold, was originally a debt due by the estate. That upon the suing out of the original execution she paid one-half of the amount, and charged it to the estate in her administration account. That for the remaining half her brother, Herbert Reese, gave a delivery bond, with Price Pollan as security, and made a like charge in his account. And that the sale was made under an execution which issued on a judgment on the delivery bond. The sheriff's return states that this execution was levied "on one negro girl, held as the property of Herbert Reese"; and in his deposition the sheriff states

that the girl "was taken from the house and possession of Herbert Reese, and that he (Reese) stated at the time that she belonged to his father's estate." And it appears from the separate administration accounts, that there was, at the time of the sale of the slave, a small balance (some sixty-five dollars) in the hands of Mrs. Frazer, and a much larger balance (some two hundred and twenty-eight dollars, after taking credit for the half of the original execution,) in the hands of Herbert Reese, arising from sales of the personal estate of the testator. In this state of facts, if there was any *devastavit*, or wrong, or illegal conduct, in allowing the sale of the slave, for which a representative of this estate might be called to account, the liability therefor rested with Herbert Reese alone. He held the possession of the slave, and his office of administrator gave him a right to that possession; and if he permitted it to pass from him, so as illegally and injuriously to affect others, without the knowledge or assent of Mrs. Frazer, no damage or loss arising therefrom can be visited upon her, it being well settled that one administrator cannot be charged with the wrong of his companion, or be made further liable than for the assets which came to his hands. *Peter v. Beverley*, 10 Peters' R. 532; *Morrow's adm'r v. Peyton's adm'r*, 8 Leigh 54.

The decision of the suit could therefore neither increase nor diminish her liabilities, let it eventuate as it might, and she stood indifferent between the parties.

She states that in 1829 the slaves belonging to her father's estate were divided between her and her brother; and that, in the division, the slave Eliza was (with others) allotted to her brother, Herbert Reese. That the division was made by consent of parties, and that she and her brother each took possession of the slaves allotted to them respectively. In *Drayton v. Drayton*, 1 Desau. R. 557, executors who were residuary legatees divided the estate of their testator be-

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tween them. It was held that this was equivalent to payment of the legacies, and that the executors severally held their shares as legatees simply. This is precisely the case here; and the division in 1829 is, I think, equivalent to the most formal assent to the bequests to Herbert Reese and Mrs. Frazer. And it is well settled that an assent to a particular interest is an assent to the bequest over. 2 Lomax on Ex'ors 130; *Lynch v. Thomas*, 3 Leigh 682. And in the case of *Acheson v. McCombs*, 3 Ired. Ch. R. 554, it was decided that when by a will personalty is given to one, with remainder to another upon the happening of a certain event, and without any trust in the executor, the assent of the executor to the immediate legacy is an assent to the bequest in remainder; and such bequest becomes a legal estate upon the happening of the contingency.

The division of the slaves in 1829 operated, then, as I conceive, as an assent by the administrators to the executory limitation in favor of Frederick R. Frazer; and I do not see how his title could be divested by sale under an execution issued, whether against the goods and chattels of Herbert Reese, or against the goods and chattels of the testator, Frederick Reese.

It is argued that it is competent for an executor under certain circumstances to retract his assent to a legacy: And that Herbert Reese, by representing to the sheriff when he made the levy, that the slave belonged to his father's estate, and by suffering her to be sold as such, must be taken to have retracted his assent, so far as this slave is concerned, and to have consented that she should be sold as the property of the estate. In a suit brought by Herbert Reese to recover this slave, such an argument would be entitled to much consideration, if indeed it would not be conclusive against his right to recover. To permit *him* to recover from a *bona fide* purchaser, under such circum-

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stances, would be to allow him to derive benefit from his own fraud. But the argument, as applied to the rights of Frederick R. Frazer, is, I think, without force. It seems to be true, that whilst as a general proposition an assent once given to a legacy can never afterwards be retracted, there are exceptions to the rule; as when the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and its recall is not attended with injury to a third person, as to a *bona fide* purchaser from the legatee on the faith of such assent. It is said, that it is only reasonable that the executor, under particular circumstances, should have the power of retracting it; as when he assents upon a reasonable ground for considering that the assets are sufficient to meet all demands, but unknown debts are unexpectedly claimed, which occasions a deficiency. 2 Williams on Ex'ors 849. It is obvious, however, that not one of the reasons on which the exception is based exists for applying the exception here, so as to affect the rights of the legatee in remainder. The division of the slaves in 1829, as before stated, was accompanied by immediate possession on the part of Herbert Reese; and that possession enured at once to the benefit of the legatee in remainder. And Herbert Reese, so far from being met by an expected deficiency of assets, in fact held in his own hands a large balance, more than ample to satisfy the execution. No retraxit of his assent to the legacy could, therefore, have divested the title of Frederick R. Frazer. It is to be observed also, that whilst from the deposition of the sheriff it would seem that he, at the sale, regarded the execution under which he sold as one against the estate of the testator, and treated the girl as the property of the estate, the execution was, as before stated, in fact against the goods and chattels of Herbert Reese and his surety in the delivery bond, Price Pollan, and the return states

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a levy on the girl as the property of Herbert Reese. Whatever may have been the impressions of the sheriff, at the time of the sale, as to the legal effect of the process under which he was acting, or as to the title of the property sold to satisfy it, I think it clear that under the circumstances the purchaser could acquire nothing but the interest of Herbert Reese in the slave: And consequently, that Frederick R. Frazer had such an interest in the slave Eliza and her increase as to entitle him, upon alleging and showing just cause to apprehend danger of their being eloiigned, so as to jeopard his recovery of them when the time for the enjoyment of his legacy should arrive, to ask and have such orders in chancery as would be likely to insure the forthcoming of the property on the happening of the contingency provided for in the will.

The counsel for the appellees, whilst he objected here to the jurisdiction, did not seem to lay much stress on the objection, his main argument being directed to the question of title; and all objection to the want of power in the chancellor to act on the case made, is, I think, met and answered by the decision of this court in the case of *Chisholm v. Starke*, 3 Call 25. In that case the testator bequeathed his slaves to his wife, remainder to her children. The wife married again, and the second husband sold one of the slaves to a *bona fide* purchaser, who had no notice of the right of those in remainder; and he, before receiving such notice, sold the slave to another person. The bill filed by the remaindermen in that case did not allege any purpose on the part of Chisholm to remove the slaves out of the state. It simply alleged that Richardson, the second husband, had frequently endeavored to sell the slaves as his absolute property; that he had sold one of them to Chisholm, who lived at a distance in the state; that he had attempted to sell others; and pretended that the increase of the

slaves was his. The chancellor decreed that Richardson should give bond, conditioned for delivering to the plaintiffs the slaves in his possession and their increase, living at the death of his wife, and that Richardson and Chisholm should give bond for delivering the slave which had been purchased by Chisholm. Upon an appeal by Chisholm, this court reversed so much of the decree as required the bond of *him*, on the ground of his having stated in his answer, which was not disproved, that he was a fair purchaser for valuable consideration, without notice of the title of the appellees, and had sold the slave before suit brought, and before any notice of the appellees' claim to or interest in the said slave; and ordered that the bill should be dismissed as to him, but decreed that Richardson should give bond for the forthcoming of all the slaves. The court evidently regarded the conduct of Richardson, in setting up an absolute title to the slaves, in selling one of them, and threatening and endeavoring to sell others, as ground sufficient to justify the requiring of a bond from him for the delivery of the property on the termination of the life estate; and exonerated Chisholm, on the ground only of his being a purchaser without notice, and of his having sold again before suit or notice of the title of those in remainder. The conduct of Herbert Reese, in permitting the slave to be sold under the circumstances shown in the case, was such, I think, as to have justified the court in requiring a bond from him; and with respect to Bevell, there is an absence of all the circumstances which induced the court, in the case of *Chisholm v. Starke*, to excuse the purchaser: He does not in his answer deny notice of the division of the slaves, and of the claim of the appellant's intestate: He does not deny having avowed the purpose (as charged in the bill) to use, control and sell and dispose of the slaves as his own absolute property: He does not deny that the appel-

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lant had good ground for believing that he would send the slaves out of the state. In his answer he simply states that the slave Eliza was levied on and sold to satisfy executions against the estate of Frederick Reese, and that he purchased her at the sheriff's sale, and denies that the plaintiff has any title whatever to the slaves; refers to the delay of the plaintiff in asserting his right, and says that he has no new cause, as he must, in any event, still be postponed until the life estate is extinguished. Independent of his failure to deny notice of the claim of the appellant, in his answer, the testimony in the cause renders it highly probable that he did have knowledge of the claim, and he is still in possession, asserting right to treat the property as his own, free from all limitation.

I think that the Circuit court erred in dismissing the bill; and that it ought, instead thereof, to have made a decree defining the rights of the appellant in accordance with the foregoing views; and to have made such orders as were necessary to insure the forthcoming of the property on the happening of the contingency provided for in the bill.

The other judges concurred in the opinion of DANIEL, J.

The decree was as follows:

It appears to the court that in February 1829 the slaves of the testator, Frederick Reese, were, by consent of the parties, divided between the appellees, Herbert Reese and Martha T. Frazer; and that in the division the female slave Eliza was allotted to the said Herbert Reese. And the court is of opinion that said division operated as an assent by the administrators to the bequests in the will, as well in favor of Frederick R. Frazer as of the said Herbert Reese and Martha T. Frazer; and that the facts alleged in the

bill, and proved by the evidence, were such as to entitle the said Frederick R. Frazer to ask and have from the appellee, the said Herbert Reese, and the appellee Bevill, bond with sufficient security and in a proper penalty, conditioned for the forthcoming of the said slave Eliza and her descendants, on the happening of the contingency in the will of the testator mentioned: And that the Circuit court consequently erred in dismissing the bill. So much of the decree of the 31st day of March 1847, therefore, as dismisses the bill, is reversed with costs, &c. And the cause is remanded for further proceedings in conformity with the principles above declared.

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Richmond.**PATES v. ST. CLAIR.**

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April 24th.

1. An award of execution on a forfeited forthcoming bond cannot successfully be objected to on account of the invalidity of the original judgment, unless such judgment is null and void.
2. It was not improper, even before the act of 1849, Code, p. 706, § 9, to render judgment for costs in favor of the defendant against a person for whose benefit a suit was brought, when the defendant succeeded in the case.
3. In a suit brought in the name of one person for the benefit of another, a judgment stating that the parties appeared by their attorneys, and by consent the suit was dismissed, and judgment for defendant's costs against the person for whose benefit the suit was brought, it must be held that the consent is the consent of the latter, and that the judgment is proper.

At the April term 1848 of the Circuit court of Bedford county, in an action on the case then depending therein in the name of Demarcus Foutz, who sues for the benefit of John D. Pate, plaintiff, against Wingfield J. St. Clair, defendant, a judgment was rendered in the terms following, viz: This day came the parties, by their attorneys, and by their consent, it is considered by the court that this suit be dismissed, and that the defendant recover against the said John D. Pate, for whose benefit this suit is brought, his cost by him about his defence of this suit expended. On this judgment an execution issued against the goods of Pate; and he executed a forthcoming bond, with William H. Pate as his surety: And the bond was forfeited. St. Clair gave a notice to the Pates that he would move for award of execution upon the bond; and when the motion was made, John D. Pate moved the court to quash the bond, upon the ground that the original judgment was null and void. The court over-

ruled the motion, and awarded execution upon the bond: And thereupon the Pates applied to this court for a *supersedeas*, which was awarded.

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Grattan, for the appellants.

Cabell, for the appellee.

LEE, J. The judgment of a court possessing competent jurisdiction in the proceeding before it and over the person against whom it is rendered, is binding and conclusive; and however irregular or erroneous it may be, yet, so long as it remains unreversed, it cannot be drawn in question in a collateral proceeding; nor can any allegation be made against its validity. *Horsy v. Daniel*, 2 Levinz R. 161; *Hayward v. Ribbens*, 4 East's R. 311; *Prince v. Nicholson*, 1 Marsh. R. 280; 1 Chit. Pl. 100, 320. So that the only ground on which the plaintiffs in error, in any view, can be permitted to contest the validity of the original judgment in this proceeding is, that it was *ipso facto* void, and furnished no foundation for the execution upon which the forthcoming bond given by them was taken. But surely, this cannot be affirmed of a judgment for the defendant's costs against a party for whose benefit an action is brought in the name of another, and so expressed to be upon the record. Nor do I think the judgment in this case should be held to be irregular or erroneous. Courts of law will for many purposes take notice of the person for whose benefit a suit is brought, though in the name of another. Thus they will not permit the nominal plaintiff to dismiss the suit or release the action. *Per* Judge Green, *Garland v. Richeson*, 4 Rand. 266, 268; 1 Tuck. Comm. 347. See also opinion of Judge Buller in *Masters v. Miller*, 4 T. R. 320, 339. So a receipt given by the nominal plaintiff may be avoided by proof that it was given after the assignment. *Henderson v. Wild*, 2 Camp. R. 561. And admissions made by him after assignment will not be ad-

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mitted in support of demands set up against the claim by way of setoff. *Frear v. Evertson*, 20 John. R. 142. So though the nominal plaintiff have become bankrupt, the action may be maintained in his name. *Winch v. Keeley*, 1 T. R. 619. And where a bond was given, payable to the nominal plaintiff, but which was in fact for the use and benefit of another, a claim against that other was allowed by way of setoff. *Bottomley v. Brooke*, cited 1 T. R. 621. And it seems that it makes no difference that the party was not originally interested in the claim, as in the case last cited: for whether he was merely a trustee originally, or became so by a subsequent assignment of the claim, the court equally takes notice of the rights and relations of the parties. *Winch v. Keeley*, above cited. So in an action for a balance due on account, in the name of the original creditor, for the benefit of a third party, to whom it had been assigned with the defendant's consent, the defendant was allowed to offset claims he held against the assignee. *Winchester v. Hackley*, 2 Cranch R. 342.

Where a party, then, brings a suit for his own benefit, though in the name of another, and afterwards abandons his action, no reason is perceived why the court might not (even prior to the Code of 1849) properly render a judgment for the defendant's costs directly against him, thus noticing him for the purpose of holding him to a just responsibility, as well as for the purpose of protecting him against the acts or admissions of the nominal plaintiff, or any collusion between him and the defendant. Indeed, we see that where a suit has been brought in a fictitious name, or in the name of a person without his privity and consent, or of a deceased person, the court will interfere in a summary way, and will hold the party by whom the suit was prompted, or even the attorney in the case, responsible for costs. *Gynn v. Kirby*, 1 Stra. R. 402; *The People v. Bradt*, 7 John. R. 539; *Ketcham v.*

Clark, 4 John. R. 484; *Howard v. Rawson*, 2 Leigh 733, and authorities there cited.

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By the Code of 1849, (p. 706, § 9,) it is expressly provided that where there shall be judgment for the defendant's costs in a suit brought in the name of one person for the benefit of another, such judgment shall be against that other. And in the case of *Devers v. Ross*, 10 Gratt. 252, this court, on reversing the judgment of the Circuit court, rendered the judgment for costs against Flowers, for whose benefit the suit had been brought, although the case had been decided in the Circuit court, and brought to this court by *supersedeas*, before the Code of 1849 was enacted. Indeed, prior to the enactment of that Code, it was the practice of some of the Circuit courts to render the judgment for the defendant's costs (where such a judgment was to be given) against the beneficial party on the record; and, considering the extent to which the courts have gone in noticing him for certain purposes, I can perceive no well founded objection to it.

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But if the propriety of such a judgment in a general way were more questionable than I think it is, certainly any court may notice the beneficial party on the record for the purpose of receiving his consent to such a judgment. Here, the plaintiff in error, John D. Pate, for whose benefit the suit was brought, was the active party by whom it was prompted and dismissed. The attorney in the cause was his attorney, and the consent given to the dismissal of the case and to the judgment for costs may be fairly referred to him, and should be construed as his consent.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of
LEE, J.

JUDGMENT AFFIRMED.

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Term.**MARKLE'S adm'r & als. v. BURCH'S adm'r.**

April 24th.

A debt, if it had any existence, was contracted in 1819, when the debtor lived in Virginia, and was by parol. He shortly afterwards removed from the state, and remained out of it until his death in 1826. In 1840 a proceeding by foreign attachment was instituted to recover the debt. **HELD:** The statute of limitations is a good defence to the proceeding.

The case is fully stated in the opinion of Judge *Samuels*.

Baxter, for the appellants.

Cooke, for the appellee.

SAMUELS, J. This cause is brought here by appeal from a decree of the Circuit superior court of law and chancery for Bedford county, in a suit wherein John Hancock, administrator of Mary Burch, was complainant, and John Markle, Nicholas Robertson, administrator of Charles Markle deceased, and others, were defendants. The suit was originally brought, in the County court of Bedford county, by Mary Burch, in her life time, and afterwards taken to the said Circuit court, and, on the death of complainant, revived in the name of her administrator. The *subpœna* instituting the suit issued November 14th, 1820, against John Markle and John Fizee, with an endorsement thereon in these words:

“*Memo.*—This suit is against John Fizee, to recover of him money due to the other defendants, and said John Fizee is hereby forbid to pay away or out of his hands the sum of two hundred dollars, if so much he

owes said John Markle, until the final decision of this suit, or until the order of Bedford court.

WM. COOK, *Plff's Atto.*"

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Complainant's bill was filed May 14th, 1823; and although the allegations therein are somewhat equivocal, yet it must be held to assert that John Markle, the absent defendant, was indebted to complainant; and to seek to apply a debt alleged to be due from John Fizee, the home defendant, to said absent defendant, in satisfaction of complainant's demand. The bill alleged that complainant Mary Burch was tenant for life of a small tract of land, the reversion whereof belonged to Charles Markle; that in the year 1818 Charles Markle and his son, John Markle, being about to remove to the state of Missouri, John Markle, who transacted his father's business, and sold his property at pleasure, was anxious to sell said tract of land, but found some difficulty in selling it with the incumbrance of complainant's life estate thereon; that complainant was induced to sell and convey her life estate to John Fizee, for a consideration promised to her by John Markle. Charles Markle is named as defendant in the bill, but not in the process; nor is there any distinct allegation of fact which could subject him to any demand of complainant. From the want of precision in stating the terms on which complainant sold her property, it is doubtful what consideration she was to receive. It is clear enough, however, that whatever it was, it was to be paid by John Markle. It is not alleged that Charles Markle made any contract whatever in regard to the purchase of complainant's life estate. It appears clearly, moreover, that Fizee's bonds for the price of the land were made payable to John Markle; and that the money due on these bonds was the subject attached in this suit. It is quite probable, perhaps certain, upon the record on the original bill,

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that Charles Markle permitted his son to sell the reversion for the son's own benefit.

Certain proceedings were had upon the original bill up to the August term of the County court in 1823, the result of which was, that one William R. Porter, who claimed the fund attached, was permitted to receive it, upon giving bond with condition to comply with any future order or decree in the cause.

No step whatever appears to have been taken in the cause from October 1823 until November 1840, when leave was granted to complainant to amend her bill, making new parties.

In the amended bill complainant changes the ground taken in the original bill. She now alleged that John Markle's action on the subject of the purchase was only as agent for Charles Markle; that the price to be paid in money was a debt due from Charles Markle, and accordingly sought to subject his property to the payment thereof. The parol evidence taken when the cause was pending on the original bill was strong to show that John Markle was the debtor; the evidence of the same witnesses, taken pending the amended bill, tends to show that Charles Markle was the debtor; the evidence in writing, to wit, John Markle's stipulation to pay, Charles Markle's deed, the bonds of Fizee executed to John Markle, shows, satisfactorily, that John Markle was dealing with complainant on his own account, and that the purchase money for the life estate was due from him to complainant, as alleged in the original bill. The decree subjected Charles Markle's estate to complainant's debt; and from this decree this appeal is taken.

After an acquiescence of seventeen years in the allegations of the original bill, sustained by the written evidence, it would require much stronger evidence than complainant offered to sustain her amended bill, especially after Charles Markle's death.

If the complainant had established a debt against Charles Markle, it must have originated in 1819, when the deed to Fizee was executed, and when Charles Markle was in Virginia.* The first attempt to subject Charles Markle's estate was made in 1840; and the defendants rely upon the statute of limitations. There is nothing in the pleadings or proofs to prevent the operation of the statute, if the debt ever existed. In *Wilkinson, &c., v. Holloway*, 7 Leigh 277, four of the five judges who decided that case held that the debt due to the attaching creditors was a bond debt, and that therefore the statute was no bar to the recovery. The debt in this case, if any, is upon simple contract merely.

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I am of opinion to reverse the decree and dismiss the bill, with costs of both courts to the appellants.

The other judges concurred in the opinion of
SAMUELS, J.

DECREE REVERSED.

**Note by Reporter.*—Charles Markle removed to Missouri a short time after the contract was made, and remained there until his death in 1826.

Richmond.

BRAXTON, *adm'r, &c.*, v. HARRISON's *ex'ors*.1854.
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May 1st.

1. W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors of H sue T, and recover a judgment upon the bond; and he thereupon enjoins it on the ground that G was indebted to him for a legacy left by R, of whom G had been executor: And this injunction is afterwards perpetuated. **HELD:** That the executors of H are entitled to be substituted to the rights of T against G's estate, and are not confined to their remedy upon the assignment of W.
2. In this injunction suit the executors of H and W, and the administrator *de bonis non* of G, are parties, and they consent to the decree perpetuating the injunction; and also to a decree directing the executor of W, and the administrator *de bonis non*, to settle their accounts of administration upon G's estate. **HELD:**
 1. That it is a case in which there may be a decree between codefendants in favor of the executors of H against G's estate.
 2. That to ascertain whether there were assets of G's estate to pay the debt, the court might direct the accounts.
 3. If the propriety of a decree against the assets of G's estate was otherwise doubtful, the consent of the representatives of W and G clearly authorized it.
3. Though upon a hearing it might have been improper to perpetuate the injunction, yet the administrator *de bonis non* of G having consented to the decree, and all the parties appearing to have acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands of a subsequent administrator *de bonis non* of G.
4. Ten years after the perpetuation of the injunction, the second administrator *de bonis non* of G entered into an agreement under seal, with the executors of H, to pay the debt out of the assets of G's estate, when they should be received; and the executors agreed to wait with him twelve months, and to release their costs in the injunction suit, and dismiss it as far as they were concerned. But the administrator was not to be bound personally; and the executors were at liberty, if the money was not paid at the end of the year, to cancel the agreement, and proceed to enforce any of their existing legal remedies. The administrator did not collect assets within the year; and the executors afterwards sued upon this agreement. **HELD:**

1. That though the right of the executors of H to proceed against G's estate accrued when the injunction was perpetuated, yet the pendency of the injunction suit, carried on for their benefit, prevented the running of the statute of limitations against them.
2. That although it is generally true, that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations, out of the assets of the estate, upon which a suit may be maintained.
3. That there was a sufficient consideration in this case to sustain the agreement made by the administrator *de bonis non* of G; and suit could be maintained upon it by the executors of H against the administrator for satisfaction out of the assets.
4. That it was proper to sue in equity to have an account of or marshaling of assets; and this especially as, the agreement being under seal, it was doubtful whether an action at law could be maintained upon it.

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The following statement of the case is made by Judge *Moncure*:

In 1810, Benjamin Harrison being a creditor to a large amount of the estate of Philip L. Grymes, Robert West, the administrator of Grymes, paid the debt by an assignment of bonds taken at the sale of the personal estate; and in the settlement of the administration account the estate was credited with the amount of the bonds, and debited with the amount of the debt. Among the bonds assigned was one of Morgan Tomkies. In due time after this bond became due, in October 1810, Harrison's executors brought suit upon it, and obtained judgment in October 1812. A forthcoming bond was given, on which judgment was obtained in May 1813. In October following Tomkies enjoined the judgment in the Superior court of chancery at Williamsburg; stating in his bill, that as administrator of Catharine Wyatt and guardian of her only child, he had become entitled to a legacy of three

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hundred pounds, given to her by her father, John Robinson, of whom Grymes was executor; that no part of the legacy had been paid, though considerable estate of Robinson had come to the hands of Grymes. That he (Tomkies) had instituted a suit, which was then pending in said court, for the recovery of the legacy. That he had been induced to become a purchaser at the sale of Grymes' estate, and to become bound for the purchases of his ward at the sale, by the promise of West not to transfer the bond until the claim for the legacy should be ascertained; and by an understanding with him that the amount of the bond, or so much of it as might be necessary, should be set off against the legacy, or the balance which might be ascertained in the said suit to be due thereon; and that West, in violation of his said promise and agreement, had assigned the bond to Harrison's executors, who had recovered judgment and sued out execution thereon: and praying for an injunction of the judgment until the report of the commissioner in the suit brought for the recovery of the legacy as aforesaid, and for general relief. Harrison's executors and West, administrator of Grymes, were made defendants. In April 1814 Harrison's executors filed their answer, stating that their testator was a creditor by bond of Grymes for a considerable amount; that one of them attended the sale for the purpose of obtaining payment; that the negroes were sold on credit, and nothing better could be done than to receive bonds executed by purchasers at the sale to the amount of the debt; and that he accordingly received, by assignment from West, administrator as aforesaid, several bonds, among which was that of Tomkies. They profess ignorance of the facts stated in the bill on which the complainant's claim to relief was founded. In June following, West, administrator of Grymes, filed his answer, positively denying all the grounds of equity

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contained in the bill, and expressing a belief that nothing was due on account of the legacy. In October following, a motion was made to dissolve the injunction. But the court overruled the motion, and ordered that unless the parties were satisfied with a certain report mentioned in the order, and would consent to a copy of that report being evidence in the case, subject to exceptions, a commissioner should take an account of Grymes' administration of Robinson's estate, and ascertain the balance due on the said legacy, and make report to the court. In September 1815 the death of the plaintiff Tomkies was suggested, and a *scire facias* awarded to revive the suit in the name of his executor. In June 1818 the suit was revived by consent in the name of Robins, administrator of the plaintiff, against George West, executor of Robert West, who was administrator of Grymes, who was executor of Robinson, and George Healy, administrator of Grymes; and thereupon the cause coming on by consent to be heard on the bill, answers, exhibits and depositions, the defendants consenting that a copy of the accounts filed in the case of *Chowning & wife v. West, adm'r of Grymes*, settling the transactions of Grymes on the estate of Robinson, might be taken as the account in the case, the court, on consideration thereof, and with the consent of the parties, perpetuated the injunction; and, with the like consent, decreed that the defendant George West should settle the administration account of his intestate on the estate of Grymes, and the defendant Healy should settle his administration account on the same estate, before a commissioner of the court, who was directed to state, settle and report the same. Sundry proceedings were afterwards had without effect, to compel George West to settle the account directed to be settled by him as aforesaid. From a report filed in the case it appears that his reason for failing to do so

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was, that the vouchers relative to Robert West's administration of Grymes' estate were in the hands of Commissioner Ladd for a settlement of the account in another case, and could not be given up until he had reported on them. In July 1823 the suit was transferred to the Superior court of chancery for the Richmond district. In April 1827, George West being dead, and Healy no longer administrator of Grymes, a *scire facias* was awarded to revive the suit against Price Perkins, administrator *de bonis non* of Robert West, and Carter Braxton, administrator *de bonis non* of Grymes.

In this state of the case of *Tomkies v. West*, an agreement of compromise was entered into between John F. May, acting for the surviving executor of Harrison, and Braxton. Mr. May, it seems, had been retained by Harrison's executor to prosecute the suit after its removal to Richmond; and in December 1826 wrote a letter to Braxton, stating his views of the case, and of the liability both of West's and Grymes' estates to Harrison, and proposing, as Harrison's executor was old and averse to trouble and litigation, that bond with security should be given for the payment of the debt at some future time, when it might be expected that it could in a legal course be recovered. This letter commenced a negotiation which terminated in the agreement aforesaid, bearing date the 31st of January 1828. That agreement, which is under the hands and seals of the parties, states that they had compromised the matters in difference between Grymes' administrator and Harrison's executor in the suit of *Tomkies v. West*, in which they were both parties; by which compromise it was agreed that Braxton, or his successor, should pay to Harrison's executor the amount of the original judgment against Tomkies on his bond assigned to Harrison's executors as aforesaid, out of the assets of Grymes, so soon as

Braxton should have a sufficiency to pay the same in his hands; that he should have twelve months in which to make such payment; that, upon its being made, George E. and William B. Harrison, legatees of Benjamin Harrison, would execute a bond with good security, to refund to Braxton the amount so paid, provided any debt of superior dignity should be legally established against Grymes' estate, and there should not be assets sufficient for the payment thereof; that after such payment Harrison's executor would renounce all costs of the suit of *Tomkies v. West*, and give a discharge for the same, and, as far as he was concerned in the suit, enter a dismissal thereof; that if the said debt should not be fully paid at the termination of the stipulated period, Harrison's executor should be at liberty to resort to any legal means for the recovery thereof; and that nothing contained in the agreement should be construed to bind Braxton in any other capacity than that of representative of Grymes. At the foot of the agreement is a memorandum signed by Braxton, by which it was further agreed that if Harrison's executor should at the end of six months see fit to cancel the agreement, he might do so upon requiring Braxton to cancel the duplicate thereof in his possession.

In November 1828 Braxton wrote a letter to George E. Harrison, in answer to one received from him, in which letter this language is used: "In answer, I have to remark that the arrangement made between Mr. May and myself, relative to the debt due from Mr. Grymes' estate to your father, was done with the intent to end a perplexed and disagreeable law suit. On my part, as the present representative of Mr. Grymes, I was fully convinced of the justness of the claim, and wished for no other litigation. At the time this arrangement was entered into, I expected to obtain an immediate decree in favor of Mr. Grymes'

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estate against one of the former administrators for a considerable amount. Under this expectation, I only wanted time to enable me to realize the money arising from that claim." The writer then states that his expectation had been disappointed; and after referring to other sources of payment, including Mr. Grymes' land, which he says he would sell and pay the debt if he could, he uses this language: "Had the decree been obtained in January last, you should have had the money before this. Whenever the money is made, the debt to your father's estate shall be forthwith settled."

In October 1829 Braxton wrote another letter to Harrison, in which this language is used: "I expect a decree at the next chancery term for the Richmond district, against the preceding administrator on Mr. Grymes' estate, and his securities, who are very ample, for a very large amount, between sixteen and seventeen thousand dollars. There are other very large claims due the estate of Mr. Grymes; but these are the first that I expect will be tangible. Now, out of the first money collected you will be wholly, or for the greater part of your claim, satisfied."—"The compromise between Judge May and myself terminated a source of litigation that would have consumed as much time and expense as any one with which I have become acquainted, considering the number and distance of the various parties. That compromise bound the parties to settle on specified terms, and if they did not do so in twelve months, then the representatives of your father's estate were to be at liberty to pursue their original remedy. Now, I hardly imagine that it would possibly be expected a suit of the complex nature of the one that the compromise ended could be matured sooner than the expectations I have mentioned will be realized. I hope, however, your necessities may not press you before payment can be made.

The personal estate of Mr. G. in my hands is very inconsiderable. If a judgment was now had, before satisfaction of it could be obtained it would be necessary to bring a suit to subject the lands of Mr. G."

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Braxton having failed to pay the debt to Harrison's executor, the latter, in April 1833, in conjunction with George E. and William B. Harrison, sons and distributees of Benjamin Harrison, filed their bill in the Circuit court of Middlesex, for the purpose of enforcing the execution of the agreement aforesaid; setting out the material facts in relation to the agreement, and the debt for the payment of which it was entered into; charging that personal estate of Grymes to a considerable amount had come to the hands of Braxton as his administrator; that a large amount of real estate was then held by Braxton and wife in her right as sole heir and devisee of Grymes; that the estate of Grymes, both real and personal, was bound for the payment of the said debt, of which no part had been paid, and that the said George and William B. Harrison were then entitled to the whole of the said debt by the consent of Harrison's executor; making Braxton, administrator *de bonis non* with the will annexed of Grymes, and Braxton and wife, defendants to the bill; and praying for suitable relief. The agreement and said two letters of Braxton were filed as exhibits. And a bond was executed by the said George E. and William B. Harrison and a surety, in the terms prescribed by the agreement, and filed with the bill.

In July 1833 Braxton as administrator, and also for himself and wife, filed an answer. He sets out the substance of the letter received by him from Mr. May in December 1826; says that at no time prior to the agreement had he ever examined the suit of *Tomkies v. West*, nor did he at the time of the agreement have any knowledge of that suit derived from any other source than the letter; and that, entertaining no doubt

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that the facts of the case were truly stated by Mr. May, and that his opinion as to the law arising on the facts was sound and correct, he consented to execute, and did execute, the agreement. He says that according to his understanding of the agreement, if the debt should not be paid in twelve months from its date, Harrison's executor was to be at liberty to resort to any legal means for the recovery of the debt which he might have used if the agreement had never been made: in other words, might go on with the suit of *Tomkies v. West*. And he insists, that without any further enquiry this suit ought to be dismissed, and the plaintiffs turned over to that suit for any relief to which they might be entitled. But if that course should not be taken, he says the court will have to determine how far he was bound, anterior to the agreement, as the representative of Grymes' estate: in other words, whether the plaintiffs have any equitable claim against that estate. He then sets out the facts in regard to the assignment of Tomkies' bond, the proceedings at law upon it, and the proceedings in the injunction suit; and insists that when Harrison's executors delivered up to West, as administrator of Grymes, the evidence of debt which they held, and gave a receipt in full for the debt, the estate of Grymes became entirely exonerated. The claim henceforth was a claim on the bond against the obligors; or, if it could not be collected of them by due diligence, on the contract of assignment against West individually, and not as administrator of Grymes, as no administrator can make any new contract binding upon his decedent's estate. He further insists that it is manifest from the record in the suit of *Tomkies v. West*, that the injunction never would have been perpetuated if the executors of Harrison had not consented to it. He then says that since March 1830 he has discovered most material testimony in the record of a suit in the

County court of Middlesex, in which Wyatt and wife were plaintiffs, and Grymes, executor of Robinson, defendant, commenced in 1797, and abated by the death of Grymes in 1805; which suit was brought for the recovery of the same legacy claimed by Tomkies in the injunction suit. The tendency of that testimony is to show that Wyatt had given Philip Samson an order on Grymes for the legacy, and that Samson had received the amount of it, in whole or in part. Other matters are stated in the answer, but need not be here further referred to. The letter of May to Braxton was filed as an exhibit.

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In July 1846 the deposition of May was returned and filed by the plaintiffs. He makes the following, among other statements: "There had been some communications, perhaps verbal as well as written, between Mr. Braxton and myself; and some time after them Mr. B. met me in this city, and we examined together the chancery papers in the old suit of *Tomkies v. West*, and finally entered into the agreement manifested by that paper. I recollect the circumstances of our having the papers before us, because at that time I discovered first, according to my present recollection, that the decree perpetuating the injunction purported to have been made by the consent of Harrison's executors as well as Grymes' executor, which Mr. Braxton and myself both concluded to have been a mistake in the draft of the note for a decree."—"The papers in that suit were certainly before us at the time that agreement was entered into, and the subject of the consent order was then mentioned in our conversation, and my recollection is that Mr. Braxton and myself examined the papers on at least two different days during his then visit to Richmond before we entered into the agreement."

In June 1847, the cause coming on to be heard in the Superior court of chancery for the Richmond cir-

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cuit, (to which it had been transferred,) on the bill, &c., and upon the original record of the case of *Tomkies v. West*, pending in the same court, including the record of the case of *Wyatt & wife v. Robinson's ex'or*, filed therein as an exhibit on the 28th of January 1831, the court was of opinion, and decided, that the estate of Grymes was justly indebted to the estate of Harrison in the sum of one thousand and seventy-seven dollars and twenty cents, with interest from the 11th of October 1810 till paid, and nine dollars and fifty-one cents costs, according to the stipulations of the agreement aforesaid. But as no decree could be rendered for the payment of the money without a settlement of the accounts of Braxton as administrator of Grymes, the court decreed, that unless the defendant Braxton should admit assets in his hands of the estate of Grymes sufficient to satisfy the said claim, then the said defendant should render, before one of the commissioners of the court, an account of his administration of the said estate. And the said commissioner was directed to ascertain and report to the court what real estate and its value was left by Grymes at his death and passed to his heirs or devisees.

Robinson, for the appellant :

It is probable that Harrison was a creditor of Philip L. Grymes. This debt West, the administrator of Grymes, paid, took a receipt for the payment, and has received a credit for it in his administration of Grymes' estate. The debt was then discharged; and if any liability exists on that account, it must arise out of a new contract. This debt of Harrison was paid in part by the assignment by West to Harrison's executors of the bond of Tomkies; and any existing liability to Harrison's executors must arise out of that assignment. If Harrison's executors used due diligence to recover the money from Tomkies and failed, then West was

liable on his assignment. Harrison's executors did sue Tomkies, and obtain a judgment against him, which he then enjoined on the ground that as administrator of Wyatt he held a claim against Grymes' estate. To this suit Harrison's executors and West were parties; and the injunction was perpetuated by their consent. This result, it is most obvious from an inspection of the record, could not have occurred but by the consent of Harrison's executors; and therefore they might have obtained their money from Tomkies. And if West's consent bound him, still Grymes' estate should not have been subjected; and as West was only liable as assignor, the action against him was barred in five years, and in fact no action was ever instituted against him. Nor could the decree for an account in that cause have the effect to prevent the bar of the statute; because there could be no decree upon that bill between codefendants. 2 Rob. Pr. 397-8; *Yerby v. Grigsby*, 9 Leigh 387; *Crawford v. McDaniel*, 1 Rob. R. 448; *Eccleston v. Lord Skelmersdale*, 1 Beav. R. 396, 17 Eng. Ch. R. 396; *Goodwin v. Clewley*, 2 Beav. R. 30, 17 Eng. Ch. R. 30.

When the decree perpetuating the injunction was made, Harrison's executors should have been left to their action on the assignment. This right of action arose in 1818, more than nine years before the suit was revived against Braxton as representative of Grymes; and it was then irregularly revived, because in fact there was no case to revive. Tomkies had obtained all he asked, and he could not amend a bill to set up a claim of Harrison's executors against Grymes' estate.

Such was the condition of things as to Braxton and Grymes' estate when May wrote his letter to Braxton; a letter which, whatever was the purpose of the writer, did mislead Braxton; and he was misled when he executed the agreement, as is plainly shown both on the face of the agreement and the letters filed. We

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do not insist that the action of May was fraudulent ; but parties coming into equity for relief, the court must apply to them the principles applicable to other cases of the specific execution of contract. For these principles the court is referred to 2 Rob. Pr. 169, 170 ; 1 Story's Equ. Jur., § 750. Certainly equity will not execute an agreement where there is neither a meritorious or valuable consideration ; nor will it even aid a defective conveyance. *Darlington v. McCooles*, 1 Leigh 36. Here, though this agreement is called a compromise, yet it is all on one side, and is without consideration. The whole amount of the claim of Harrison's executors is their judgment against Tomkies, and that is to be paid in full. As to the costs, they were not coming to Harrison's executors, but to Tomkies, and the executors had no control over them. But moreover, the agreement expresses on its face, that Braxton did not bind himself further than he was bound before. Is this, then, a contract which a court of equity will enforce ? There must be mutuality in the contract, and for that reason the contracts of infants will not be enforced even at their suit. *Flight v. Bolland*, 3 Cond. Eng. Ch. R. 675. Does anybody imagine that an action at law could be maintained against Braxton upon this agreement, in his individual character ? And if not, certainly an action could not be maintained upon it against him as administrator. If an action against him as administrator could be maintained, then probably there might be a bill to enforce it, and for an account of assets. But if such an action cannot be maintained upon it, then there cannot be a bill in equity founded upon it.

In fact, the bill in this case is not based upon the agreement, but upon the case as it existed before the agreement was made. The plaintiffs claim as assignees and upon the doctrine of subrogation. The first ground cannot be good against Grymes' estate if not

good against the assignor West: And we have already shown that the statute bars the claim against him. Then as to the right of subrogation. The bond due to Harrison has been paid, and paid out of Grymes' estate. Whatever right exists must arise, as before said, out of the assignment. When that right is barred, any right arising out of it must be at an end. But if Harrison's executors are entitled to be subrogated to West, they can only have the same rights which West has against Grymes' estate. But West has no such right, because he assented to the decree perpetuating the injunction; or if he had any, certainly he was only entitled to a credit in his account of administration for the amount.

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Irving, for the appellees:

I take it to be clear law, that where a bond is assigned as the bond in this case was, and it is not a valid bond, it is no payment, but there is a failure of consideration, and the assignee has a right to come back upon his debtor upon the foot of his original debt. In such a case the assignment of the bond is not a payment.

There is nothing in the record of *Tomkies v. Hazall* which shows negligence in the prosecution of the claim by Harrison's executors against Tomkies. The counsel for the appellant has argued the cause without reference to the fact that Grymes' administrator was a party in that cause, and a party consenting to the perpetuation of the injunction in that cause. And it cannot be successfully maintained, that when the assignor and assignee are united in the defence, and the assignor assents to the defeat of the claim, the assignee shall be precluded from his remedy against him. But in fact there was no proof in the cause which would have authorized the dissolution of the injunction. There was proof that Wyatt's legacy due from Grymes had

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been assigned to Tomkies, and there was no proof that it had been paid. The old case of *Tomkies v. Grymes* was not discovered for twelve years after the consent decree. There is no proof that its existence was known to Harrison's executors; and it was not even known to Braxton when he filed his first answer in the case of *Tomkies v. Hazall*.

But it is insisted that the statute of limitations bars the claim of Harrison's executors; and this because there could be no decree between codefendants in *Tomkies* against *Hazall*. The authorities cited by the counsel on the other side are against him. The whole question in controversy in that case was, whether the bond of Tomkies, assigned by West to Harrison's executors, was due. In this question the interest of Harrison's executors and Grymes' administrator was the same; and when it was held that the bond was not due, everything was ascertained which was necessary to entitle Harrison's executors to a decree over against Grymes' administrator.

But the present suit is upon the agreement between May, on behalf of Harrison's executors, and Braxton. This agreement is under seal, and relates to a matter of which Braxton was fully informed. If, therefore, the case of *Tomkies v. Hazall* is at an end, and the claim arising out of it is barred by the statute, Grymes' estate is bound by this new agreement, because it admits the debt as still due. But it is said there is no mutuality in the contract. Braxton only bound himself to pay what he admitted to be due out of the assets of the estate. He obtained a delay of twelve months, which he deemed of material advantage to him, and was discharged from the costs of the suit; and he settled a protracted controversy.

It is argued that we claim through West, and that he is not entitled to recover against Grymes' estate: And this is the vice of the argument on the other side.

We do not claim through West. We say that the bond of Tomkies not being a valid debt, the assignment of that bond to Harrison's executors was not a payment; but that so much of our original debt due by bond, is a still subsisting debt, which we are entitled to have paid out of the estate of Grymes, the debtor.

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Robinson, for the appellant, in reply :

It is argued by the counsel for the appellees, that the debt due from Grymes to Harrison had never been paid. It has been taken in receipted as paid, and the administrator of Grymes has been allowed a credit for its payment. It was paid in part by Morgan Tomkies' bond; and whatever rights the plaintiffs have in this case must arise out of that contract of assignment. They may have taken it without recourse, and in that case they must certainly lose it. It is, therefore, this contract which is the origin of their rights. It may be that in the case of a forged bond the payment might be treated as a nullity; but here was a valid bond, proved to be so by the judgment upon it. When, then, West passed this bond to Harrison's executors, he passed to them value. But if it is said it was a forged bond, or that it was subject to setoff, then this is to be proved. Here West in his answer says a part of this setoff, and he believes all of it, had been paid. Then is it enough for Harrison's executors to consent to the decree, and to use it to prove their claim against Grymes' estate?

If any question of law is settled, it is settled law that Harrison's executors have no claim upon the foundation of the original debt. *Thacher v. Dinsmore*, 5 Mass. R. 299; *Bank of St. Albans v. Gilliland*, 23 Wend. R. 311; *Shore v. Shore*, 22 Eng. Ch. R. 378. If there had been a surety in the original bond, could his liability be revived? This subject is well treated in

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Wiseman v. Lyman, 7 Mass. R. 286. Then when West transferred Tomkies' bond in discharge of Grymes' debt, the remedy of Harrison's executors is upon his undertaking, whether express or implied upon the transfer. In a transfer of a forged note there is an implied warranty of its genuineness; but there is no such warranty that the parties are solvent. *Edmunds v. Digges*, 1 Gratt. 359. If, therefore, West had paid the amount in bank notes, Harrison's executors would have had no remedy either upon the original bond or the notes. And in *Mays v. Callison*, 6 Leigh 230, it is said that it might be submitted to the jury whether upon all the facts there was a warranty that the bond had not been paid: That was an action by an assignee against his assignor. The liabilities of an assignor are stated in *Turneys v. Hunt*, 8 B. Monr. 401. In all such cases, where the bond assigned is a valid instrument, as was the bond in this case, the question of the assignor's liability resolves itself into a question of due diligence; and upon that question there can be no doubt in this case, unless the injunction concludes it; which it does not. *McClung v. Arbuckle*, 6 Munf. 315. It is clear that if due diligence had been used the injunction would not have been perpetuated: For certainly West had a right to enforce the payment by Tomkies of his bond. *White v. Banister*, 1 Wash. 166; *Pulliam v. Winston*, 5 Leigh 324. This would have been the case if West had sued Tomkies; and the case is still stronger when the suit is by an assignee, as no equity could be set up against the bond unless there had been notice of it before the assignment. Here there was no such equity; for West denies expressly the equity set up in the bill; and there was no proof of it in the cause. Then it was the fault of Harrison's executors that the injunction was perpetuated; and they therefore can have no equity to compel Grymes' estate to pay the debt.

There is but one answer to this argument: That is, that Grymes owed Tomkies. This is necessary to their recovery, and they must prove it. The proofs we think ought to satisfy the court that Tomkies had no valid claim against Grymes' estate; but whether or not this be so, Harrison's executors do not prove that he had. They attempt to obviate this objection by the concurrent consent of West's and Grymes' administrators. But this does not excuse Harrison's executors, unless they show that Grymes' estate has not been injured by the perpetuation of the injunction.

But if Harrison's executors had a right to recover from Grymes' estate the amount of Tomkies' bond, that recovery was to be had either in the suit of *Tomkies v. Hawall* or by a new action. If they could not recover in that suit, then their claim was barred after five years from the perpetuation of the injunction. If they could have recovered in that suit, then this suit was improperly instituted: And this objection is distinctly taken in the answer of Braxton. This conclusion is inevitable if the case of *Heywood v. Covington*, 4 Leigh 373, is to be respected.

But the agreement between May, acting for Harrison's executors, and Braxton is relied on to sustain this claim. If this new agreement is to alter the rights and liabilities of the parties, then Braxton was misled. The letters show that he derived his information from May. There was, moreover, no consideration for the agreement. It is said Braxton obtained a year's indulgence. But this is no consideration. Forbearance to an executor is only a consideration where he binds himself; and this he expressly declined to do. There were in fact no assets in his hands at the time; and if there were assets, it was not the interest of the estate that indulgence should be given. As to the dismissal of the suit, that was not within the control of Harri-

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son's executors; and in fact it is not yet dismissed : And the same may be said of the costs.

It is argued that the agreement and letters dispense with the proof of due diligence, and that the debt was just. It would be most unjust that these papers should have this effect. Braxton knew the facts or he did not. If he did not, then he could not be bound. If he did know, a court of equity will not permit an executor to injure the estate by his admissions. Since the statute, Code, p. 548, § 6, his admissions could not affect Grymes' estate. According to the weight of authority, no executor can preclude the estate from setting up any defence by his admissions. *Thompson v. Peter*, 12 Wheat. R. 565; *Tullock v. Dunn*, 21 Eng. C. L. 478; *Scholey v. Walton*, 12 Mees. & Welsb. 510; *Fritz v. Thomas*, 1 Whart. R. 66; *Reynolds v. Hamilton*, 7 Watts' R. 420. If the claim was not just without the agreement and letters, it is not just with them. This agreement, then, gives no strength to the plaintiffs' claim, either to the right or to the remedy; and therefore the bill should be dismissed.

MONCURE, J., after stating the case, proceeded :

It was contended by the counsel for the appellants in this case, that conceding that the bond of Tomkies was assigned by West to Harrison's executors in payment of a debt due by Grymes to them, and that they used due diligence to recover the amount of the bond, but failed to do so by reason of its being satisfied by a debt due by Grymes to Tomkies, still they would have no claim to relief, even in equity, against Grymes' estate, and would have to rely alone on the recourse which his contract of assignment might give them against West individually.

It will be a sufficient answer to the above proposition to say, that if the bond of Tomkies was satisfied

by a debt due by Grymes to Tomkies, it was a debt of the highest dignity; being due by Grymes, who was executor of John Robinson, to Tomkies, as assignee of a legacy given by said Robinson to his daughter, Mrs. Wyatt. This debt was not charged to the estate of Grymes in the administration account of West; and having, in effect, been paid by Harrison's executors, they are entitled to be substituted in equity to the place of the creditor, and to have the debt, to the extent to which they are entitled to it, paid out of the estate of Grymes.

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It was further contended, that if Harrison's executors could have had any recourse against the estate of Grymes for the amount of Tomkies' bond, it could only have been on the terms of using due diligence to collect the bond; and that they did not use due diligence, in as much as they consented to the decree perpetuating the injunction of the judgment on the bond, without which consent the injunction would not have been perpetuated.

It is not pretended that there was any want of diligence on the part of Harrison's executors, except in giving their consent to the decree of perpetuation. They seem to have been prompt, not only in asserting their claim against Grymes' estate on the day of sale, but in suing on the bond of Tomkies shortly after it became due, and obtaining a judgment at law, and then a judgment on a forthcoming bond, when they were enjoined from further proceedings. They promptly filed their answer to the bill of injunction, and moved to dissolve it; but their motion was overruled, and an account was ordered. Afterwards, by consent of parties, the cause came on to be heard, the same account settled in another case was taken as the account in the injunction suit, and the injunction was dissolved. Whether it would have been dissolved but for such consent, it is impossible to say, and unnecessary to

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decide. - There was filed with the bill an affidavit of Wyatt, the only child and distributee at law of the legatee, Mrs. Wyatt, sustaining its allegation; to the reading of which affidavit as evidence no exception was taken. The record of the suit of *Wyatt & wife v. Grymes*, in the County court of Middlesex, was not an exhibit in the injunction suit, and had not then been discovered. It is true the answer of West denied the equity of the bill, and was sustained in part by a deposition. In the condition in which the case was, the injunction should, I think, have been dissolved. But the court did not think so, and overruled the motion for that purpose, and ordered the account. This was an indication of the opinion of the court, that if, upon taking the account, Grymes should be found to owe as much on account of the legacy as the amount of the judgment, the injunction should be perpetuated. And when afterwards the same account was taken in another suit of another legatee of Robinson, and it was thereby ascertained that Grymes had received ample estate of Robinson to pay all his legacies, the representatives of West and of Grymes, who were defendants in the injunction suit, doubtless wishing to save the trouble and expense of retaking the same account, and believing that there was at least as much due on the legacy to Mrs. Wyatt as was equal to the amount of the judgment against Tomkies, consented to the perpetuation of the injunction. There was nothing then in the case to show that any part of the legacy had been paid. West had said in his answer that he had a voucher for the payment of one hundred pounds, and that it was probable nothing was due on account of the legacy; but there was no proof to sustain these allegations.

And when the cause came on to be heard, it presented but one difficulty; and that was in regard to the right of Tomkies to have his bond set off against

the legacy. So far as Grymes' estate was concerned, it was simply a question whether so much of the legacy as was equal to the amount of the bond should be paid to Harrison's executors or some other person. If the injunction should be perpetuated, it would be due to Harrison's executors: If dissolved, to Tomkies, or some other person. It was, therefore, of no consequence to Grymes' estate whether it was perpetuated or dissolved. It was desirable of course to end the litigation; and it could best be ended by a consent decree; to which, it seems from the record, the consent of Harrison's executors was obtained. The representatives of West and of Grymes seem, therefore, to have acted in good faith in consenting to the decree. Certainly there is nothing to impugn the good faith of Harrison's executors in giving their consent, if in fact they did give it; as must be taken to be the fact, since it so appears by the record. They might lose, but could not gain, by giving their consent. By doing so they gave up all claim against Tomkies, and consented to retain only their recourse against Grymes' estate. They could safely do this if they chose, with the consent of the representatives of West and of Grymes. An assignee may safely be governed by the instructions of the assignor in the management of the assigned claim; and ordinarily he could not disregard them without endangering his recourse against the assignor. When an obligor in an assigned bond enjoins a judgment on the bond on the ground of some equity existing between himself and the assignor, the assignee is generally ignorant of the facts, and leaves them to be litigated between the obligor and assignor. He has a right to require strict proof of the facts, because he has a right to enforce the bond if due, as well as to have his recourse against the assignor. But he may, if he choose, waive the former right and retain the latter, if the assignor admit the ground of equity and consent

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to a decree of perpetuation. The consent of the assignee to the decree has no other effect than as a waiver of his right to proceed further on the bond, and cannot affect his recourse against his assignor, who also consented. Nothing would be plainer than this in a case in which an assignor is acting in his own right, and there can be no difference in a case in which he is acting as administrator; supposing him to act in good faith, or that the assignee has no notice or reason to believe that he is acting otherwise. An administrator has an undoubted right to confess a judgment, or consent to a decree, if he believes that the interest of the estate he represents requires it. Whether, therefore, the injunction would have been perpetuated or not without the consent of Harrison's executors, yet, as West's and Grymes' representatives also consented, and as all parties seem to have acted in good faith in the matter, Harrison's executors did not thereby forfeit their recourse against the estate of Grymes, but became entitled, by the perpetuation of the injunction, to demand of that estate the amount of the judgment against Tomkies.

It was further contended, that the right of Harrison's executors, if any, to have recourse against Grymes' estate, accrued at the time of the perpetuation of the injunction in 1818, and could not be enforced in the injunction suit, but only by a new and independent suit; so that when the agreement of compromise was made in 1828, on which this suit was brought, the claim of Harrison's executors was barred by the act of limitations.

It is true that the right of Harrison's executors to have recourse against Grymes' estate accrued at the time of the perpetuation of the injunction; but it is not, I think, true that such right could not be enforced in the injunction suit. I think the case came within the reason and operation of the rule, that "where a

case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity has a right and often is bound to make a decree between the defendants." See 2 Rob. Pr. 397, and the cases cited; *Fox v. Taliaferro*, 4 Munf. 243; *Dade's adm'r v. Madison*, 5 Leigh 401. Though a suit be disposed of as to the plaintiff, it may be retained until proper accounts can be taken, in order to render to one of the defendants the relief to which he may be entitled against the other. *Morris, &c. v. Terrell*, 2 Rand. 6. A defendant may in some cases object to a decree against him in favor of his co-defendant, on the ground that there is no issue made up between them, and their peculiar matters of difference have not been ascertained and settled. But the party entitled to make such objection may certainly waive it, and consent to a decree against him; and it may often be his interest to do so. In this case both West's administrator and Grymes' administrator (Healy) consented, not only to the perpetuation of the injunction, but to a decree, "that the defendant George West settle the transactions of his intestate on the estate of Philip L. Grymes, and that the defendant George Healy also settle his transactions on the estate of the said Philip L. Grymes, before one of the commissioners" of the court, who was directed to settle, state and report the same. This decree could only have been made on the admission of the administrators of West and Grymes, that the estate of Grymes was liable to Harrison's executors for the amount of the enjoined judgment, and by a decree in that suit, so soon as it could be ascertained, by a settlement of the accounts, that there were sufficient assets to meet the liability. It is a mistake to suppose that the injunction suit was brought, not only to enjoin the judgment, but also to recover the balance of the legacy claimed by Tomkies. A suit had been brought by

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Tomkies for that legacy, and was pending when the injunction suit was brought. And the only object of the latter suit was to enjoin the judgment on the assigned bond until a decree could be obtained in the other suit, and to obtain relief to the extent of that judgment. When the injunction was perpetuated, Tomkies obtained all the relief which he sought, or to which he was entitled, in the injunction suit. Its further prosecution, therefore, could only have been for the benefit of Harrison's executors. This suit was pending for the benefit of Harrison's executors when the agreement of compromise was made in 1828, and their claim was not then barred by the act of limitations.

It was further contended, that the agreement of 1828 is of no effect: 1. Because an administrator can create no new cause of action, nor revive an old one, against his decedent's estate. 2. Because the agreement was made on the mere representation of the counsel of Harrison's executors, which, though not fraudulent, yet tended to mislead and did mislead the administrator of Grymes; and in ignorance of the fact that the decree of perpetuation was by their consent, and of the existence of the record of the suit of *Wyatt & wife v. Grymes* in Middlesex County court. 3. Because it was founded on no consideration, and was intended to give no new remedy to Harrison's executors, in case it should not be performed by Braxton, but leave them to resort to such remedies as they had, if any, when the agreement was entered into.

As to the first objection, it is certainly true, as a general rule, that an administrator can create no new cause of action against his decedent's estate. But he has all the powers which are necessary to a proper discharge of the duties of his office. He may make settlements and compromises with creditors of the estate, and give them confessions of judgment; and

though he may thereby render himself liable for a *devastavit*, yet they will be entitled to the benefit of his acts, if they deal with him in good faith. He may submit to arbitration matters in dispute in respect of the personal estate, and render it liable for the performance of the award. 1 Lomax on Ex'ors 356. As was said by Judge Cabell in *Wheatley v. Martin's adm'r*, 6 Leigh 62, 71, "It is competent to an executor or administrator to submit to arbitration any controversy concerning the estate, whether the estate claims to be a debtor or creditor. This results, necessarily, from the full dominion which the law gives him over the assets, and the full discretion which it vests in him for the settlement and liquidation of all claims due to or from the estate. And although a mere submission to arbitration will not bind the executor or administrator, personally, to pay the sum awarded out of his own estate, yet the award is binding on him in his fiduciary character, and consequently on the assets of the estate which he represents. *Pearson v. Henry*, 5 T. R. 6; *Lyle v. Rodgers*, 5 Wheat. R. 394." An executor or administrator may be sued as such, on promises to pay a debt of the estate. A count, on an account stated by a defendant as executor, respecting moneys due from the testator, or from the defendant as executor, may be supported, and joined with counts on promises by the testator. Chitty on Contr. 275; 1 Chitty's Plead. 205; *Secar v. Atkinson*, 1 H. Bl. 102; 2 Saund. 117 e, note 2; *Whitaker v. Whitaker*, 6 John. R. 112; *Carter v. Phelps' adm'r*, 8 Id. 343. This doctrine has been fully recognized in Virginia. *Epes' adm'r v. Dudley, adm'r*, 5 Rand. 437; *Bishop v. Harrison's adm'r*, 2 Leigh 532. In the latter case Judge Cabell said, "It is perfectly clear that in an action against an executor or administrator, such counts," (that is, counts on promises by the executor as such, and counts on promises by the testator,) "may be

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joined; and that that is the proper mode of declaring against executors or administrators to save the statute of limitations." See also 2 Lomax on Ex'ors 419. Whether, before the Code took effect, an executor or administrator might have revived a debt barred by the act of limitations, is a question which may admit of controversy, and about which there is some conflict of authority. The cases of *Peck v. Botsford*, 7 Conn. R. 172; *Fritz v. Thomas*, 1 Whart. R. 66; and possibly *Thompson v. Peter*, 12 Wheat. 565, decide or assume that he could not. In all these cases the debt had been long barred when the promise was made; and vague and loose admissions were relied on as evidence of a promise, which might not have been sufficient even if made by the party who owed the debt. The observations of the court should be taken in reference to the cases in which they were made. Chief Justice Marshall, in saying, in *Thompson v. Peter*, that "declarations against him" (the executor or administrator) "have never been held to take the promise of a testator or intestate out of the act; indeed, the contrary has been held," surely did not mean to say that an executor or administrator could not be sued on his promise to pay a debt of his testator or intestate not barred at the time of making the promise, and that such promise would not prevent the operation of the act; for he knew that the law was well settled otherwise. He probably only intended to say that mere *declarations*, such as were proved in that case, and as contradistinguished from a *promise* of an executor, had never been held to take the promise of the testator out of the act. Chief Justice Gibson did not mean to say so in *Fritz v. Thomas*, for he had expressly said otherwise in *Collins v. Weiser*, 12 Serg. & Raw. 97, in which he held that an administratrix was liable as such on an implied promise for money paid, laid out and expended. His remarks in *Fritz v. Thomas*, in regard to

the danger of making an estate liable on vague and indefinite admissions and promises of the executor or administrator, who is often ignorant of the transaction, are certainly very just; and courts and juries should be cautious in weighing the evidence of such admissions and promises. Admissions which would have been held sufficient to take a debt due by the person making them out of the statute have been held insufficient for that purpose when made by an executor or administrator.

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In *Tullock v. Dunn*, 21 Eng. C. L. R. 478, Chief Justice Abbott said: "As against an executor, an acknowledgment merely is not sufficient to take a case out of the statute; there must be an express promise." 2 Lomax on Ex'ors 418. But that an executor or administrator might be sued as such on the promise to pay a debt of his testator or intestate not barred at the time of making the promise, is too well settled to admit of controversy. In this case, when the agreement was made, there was, as I have attempted to show, a debt due by Grymes' estate to Harrison's executors, not barred by the act of limitations, but in a course of continued prosecution from the instant of the accrual of the cause of action. By the decree perpetuating the injunction and directing a settlement of the administration of Grymes' estate, that estate was rendered liable, in whosoever hands it might come, for the claim of Harrison's executors. A judgment against an administrator, even though it be confessed by him, may be revived against an administrator *de bonis non*. A suit may be brought against the latter on a promise made by the former to pay a debt of his intestate. *Bishop v. Harrison's adm'r*, 2 Leigh 532. "It is clearly competent to an executor," says Judge Cabell in that case, "by his promise to pay a debt of the testator, to exempt the case from the operation of the statute of limitations; and it is no *devas*

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tavit in him to do so. If the executor die or be removed before he has paid the debt, it still remains a debt due from the testator; and the obligation to pay it devolves on the administrator *de bonis non*, who comes in the place of the executor, and is the representative of the testator." When, therefore, Healy, by whose consent the decree had been rendered, was removed from the administration, and Braxton was appointed administrator *de bonis non*, Harrison's executors had a right to have the suit revived against the latter, and accordingly sued out a *scire facias* for the purpose. In this state of things Braxton, who was suing Healy and his securities for the assets in his hands, and was expecting soon to recover them, and who also, in right of his wife, was sole residuary devisee and legatee of Grymes, agreed, on certain terms, to pay the debt to Harrison's executors out of the assets when recovered. I think the agreement is clearly binding upon him as administrator of Grymes, unless it is invalid on the second and third objections made to it, or either of them.

As to the second objection, that the agreement was made on the mere representation of the counsel of Harrison's executors, and in ignorance of the fact that the decree of perpetuation was made by their consent, and of the existence of the record of the suit of *Wyatt & wife v. Grymes*. May, the counsel of Harrison's executors, was guilty of no fraud or misrepresentation, and Braxton was not taken by surprise, in making the agreement. After the suit of *Tomkies v. West* had been removed from Williamsburg to Richmond, May was retained to prosecute it as counsel for Harrison's executors. He examined the case, and wrote to Braxton in December 1826, stating his views of it, and proposing an agreement, saying that his client was "old and averse to trouble and litigation." The agreement was accordingly made about a year there-

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after. In the letter, nothing was said about the consent of Harrison's executors to the decree of perpetuation. I have attempted to show that such consent, given without fraud, which is not imputed to them, did not affect their right to recourse against Grymes' estate. It is probable that May had not adverted to the fact, or did not deem it material, when he wrote the letter. But the fact was known to Braxton before he entered into the agreement, as is proved in May's deposition. Braxton had ample time and opportunity to make himself acquainted with all the facts. He appears to have done so, at least so far as to examine the record in *Tomkies v. West*, which was the only source from which May professed to derive his information. May proves that Braxton and himself examined the papers, on at least two different days, before they entered into the agreement.

In Braxton's letters to Harrison, written in November 1828 and October 1829, nearly one and two years after the date of the agreement, the former expresses his satisfaction therewith, and his desire and intention to perform it on his part. It is needless to enquire how far the record of the suit of *Wyatt & wife v. Grymes* tends to show that the legacy, or any part of it, had been paid by Grymes in his life time, or what would have been its effect had a copy of it been filed as evidence in the suit of *Tomkies v. West* when the consent decree was rendered. When that record was discovered by Braxton more than ten years had elapsed since the decree of perpetuation, and several years since the date of the agreement; and it was then too late to give it any effect on either. It would have been too late to affect the agreement, even if it had been a compromise of a doubtful claim. The compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their

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rights. *Per* Gibson, chief justice, in *Hoge v. Hoge*, 1 Watts' R. 163, 216. As was said by the master of the rolls in *Pickering v. Pickering*, 2 Beav. R. 31, 17 Eng. Ch. R. 31, "When parties whose rights are questionable have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among themselves, every court feels disposed to support the conclusions or agreements to which they may fairly come at the time, and that, notwithstanding the subsequent discovery of common error."

As to the third and last objection, that the agreement was founded on no consideration, and was intended to give no new remedy to Harrison's executors in case it should not be performed by Braxton, but leave them to resort to such remedies as they had, if any, when the agreement was entered into. If, at the date of the agreement, Grymes' estate was already liable to Harrison's executors for the amount of the judgment against Tomkies, as I have before endeavored to show, then the existence of that liability was of itself a sufficient consideration for the agreement; it being in effect an account stated by an administrator of a debt due by his testator, and a promise to pay the amount out of the assets; which, we have seen, is a good cause of action against an administrator in his representative character. But even if that liability had been doubtful, it was at least a subject of controversy in a pending suit at the time the agreement was entered into, and was a good consideration for a compromise. "There can be no doubt that the resignation of a colorable claim, conflicting with that of another person, and the settlement of the dispute between the parties without suit, constitute a good consideration"; and "in these cases, inequality of consideration does not, of itself, form any objection." *Chitty on Contr.* 26. But it is said there was in effect no consideration

in this case, the promise being to pay the entire debt claimed by Harrison's executors. The promise, it will be observed, was not to pay the debt out of the proper estate of Braxton, but out of the assets of his testator when enough for the purpose should come to his hands. And, out of abundant caution, it was further expressly declared in the agreement that nothing therein contained should be construed to bind the administrator of Grymes in any other than his representative capacity. What would be a reasonable compromise for the administrator to make on account of his testator's estate, was a question which depended upon all the circumstances. If Harrison's executors had confidence in their claim, they could not be expected to give much, if any of it, up; or to do more for the sake of ending litigation than give a little more time for payment; especially as the security of the debt was not to be increased. And if Grymes' administrator had good reason to apprehend that the whole debt would be recovered of his testator's estate, (and he says in one of his letters that when he entered into the agreement he was fully convinced of the justness of the claim,) he might well be willing to end the litigation by agreeing to pay the debt in a limited time, and out of the assets when in hand. Such a compromise, under such circumstances, could not be said to be without a sufficient consideration to sustain it. If, under such circumstances, Grymes' administrator had confessed a decree when assets for the whole amount of the debt, the decree would have bound the estate; and there is at least as much reason in its being bound by his agreement to pay the debt when assets and after a limited period. Harrison's executors had obtained a decree in the suit of *Tomkies v. West* for the settlement of Healy's administration account on Grymes' estate. Healy had been removed and Braxton appointed administrator in his place; and the suit

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had been revived against the latter. Braxton was prosecuting a suit, and expecting very soon to obtain a decree, against Healy and his sureties, for a large amount of the assets of Grymes. He was fully convinced of the justness of the claim of Harrison's executors, and wished to end the litigation in *Tomkies v. West*, and to have sufficient time to obtain his expected decree, and realize the amount, or at least enough to pay the claim.

In this state of things, the agreement was made, and the objects which Braxton seems to have had in view were thereby secured. It stipulated that Braxton should have at least twelve months for the payment of the debt, and then should only be bound to pay it as administrator, and out of the assets when received; that upon the payment of the money a bond of indemnity should be executed by Harrison's legatees to Braxton; and Harrison's executors would dismiss the suit of *Tomkies v. West*, as far as they were concerned, and relinquish the costs. That suit was, in effect, their suit after the decree of 1818, and the further prosecution of it was at their costs. *Morris, &c. v. Terrell*, 2. Rand. 6. They had a right, therefore, to stipulate for its dismissal, even absolutely; and for the relinquishment of the costs. I think these stipulations constituted a sufficient legal consideration for the agreement on the part of Grymes' administrator. The memorandum annexed to the agreement, giving Harrison's executors the right to cancel the agreement at the end of six months, upon requiring Braxton to cancel the duplicate thereof in his possession, does not alter the case. It is not pretended that the agreement was ever in fact canceled. On the contrary, it appears that it was not, and that for nearly two years thereafter Harrison's executors were urging, and Braxton was promising, a compliance therewith on his part. I also think that the agreement gives, and was intended

to give, a new remedy thereon to Harrison's executors for the nonperformance thereof by Grymes' administrator, and does not leave them to resort to their old, as their only, remedy. Being a valid agreement, a remedy thereon for a breach of it would seem to follow as a necessary consequence. An intention to preclude such a remedy, if it would not be wholly repugnant and void, ought at least to be plainly indicated, to have any legal effect. There is nothing in the agreement in question to indicate such an intention; though in reserving liberty to Harrison's executors, in case of nonpayment of the debt at the termination of the period stipulated, to resort to any legal means for the recovery thereof, it was doubtless intended not to extinguish the old remedy, but to give them a right to resort to the old or new at their election. The stipulation that nothing contained in the agreement should be construed to bind the administrator in any other than his representative capacity plainly assumes that it was intended to bind him in that.

It was further contended, that no action at law could be sustained upon the agreement; that, in coming into a court of equity for relief, the plaintiffs must be subjected to those principles which are applicable to a suit for specific performance, and that according to them Harrison's executors were not entitled to relief.

It is unnecessary to decide in this case whether an action at law could have been sustained upon the agreement. If it could, the counsel for the appellant seemed to admit that a suit in equity might have been proper to obtain an account of the assets, and have them marshaled, if necessary. But conceding that it could not, that fact would seem to strengthen, rather than weaken, the right of Harrison's executors to come into equity for relief. It was expressly declared by the agreement that the estate of Grymes should be

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bound for the debt, and not the administrator personally: And if, by reason of the seals annexed to the agreement, the debt could not be recovered of the estate at law, surely a court of equity, which looks to substance and not form, ought, for that very cause if no other, to afford relief; unless there be something to prevent it, in the latter part of the proposition above stated. I do not think that there is. Whatever equity Grymes' administrator may have against Tomkies, or even against West or Healy, he can have none against Harrison's executors. They have acted in good faith, and ask for nothing to which they are not in conscience entitled. They are *bona fide* creditors of Grymes, whose estate is ample for the payment of the debt; and yet they have been endeavoring in vain to obtain payment, for nearly fifty years since the death of Grymes, and nearly twenty-five since the date of the agreement. They have performed their part of the agreement, so far as it was to be performed before the payment of the debt; and are ready to perform the residue upon such payment. And they now ask that it may be performed on the other side. I know of no principle of equity on which relief can be denied them.

Lastly, it was contended that if Harrison's executors were entitled to obtain relief, for the breach of the agreement, by a further prosecution of the suit of *Tomkies v. West*, they could obtain it only in that way, and not by a new suit on the agreement; on the principle of the case of *Heywood v. Covington's heirs*, 4 Leigh 373. I do not think that principle applies to this case. There, a suit was brought in the County court for a sale and partition of real estate of an intestate among his heirs. A sale was accordingly made under a decree in the suit; and the purchaser refused to complete his purchase. Pending the suit in the County court, the heirs brought a suit against the

purchaser in the Superior court for specific execution. This court decided that the Superior court could not entertain the bill pending the suit in the County court. There the sale was made, not by the heirs by an agreement *in pais*, but by a commissioner of the court; in effect by the court, in a pending cause. The purchaser, by buying under a decree, had subjected himself to the orders of the court in that cause; and the appropriate and only remedy against him, at least during the pendency of the cause, was by some proceeding therein. But here, the parties to a pending cause, or some of them, enter into an agreement out of court; the main object of which is, not to prosecute the suit further, but to put an end to it. And though liberty is reserved to Harrison's executors, in a certain event, to resort to their original remedy, yet that was intended as a benefit to them, and not to deprive them of the right, at their election, to sue upon the agreement. I think they had not only a right to bring such a suit, but that it was a more suitable remedy, under all the circumstances, than a further prosecution of the old suit of *Tomkies v. West*. By the terms of the agreement that suit is to be dismissed, and the costs of Harrison's executors therein relinquished, when the debt is paid. The court below can provide for the performance of this part of the agreement, if necessary, in the final decree which may be made in this case.

Upon the whole, I think the decree is right, and ought to be affirmed.

SAMUELS, *J.* was of opinion that the decree should be reversed, and the bill dismissed, without prejudice to the appellee's remedy in the case of *Tomkies' adm'r v. West's adm'r & others*.

LEE, *J.* was of opinion that Harrison's executors
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were bound to show that it was proper to perpetuate the injunction in the case of *Tomkies' adm'r v. West's adm'r & others*. That their remedy was in that suit. That the statute of limitations applied to this case. That moreover, the agreement between Braxton and May, as the agent of Harrison's executors, afforded no foundation for a suit ; and if it did, the circumstances under which it was made forbade a court of equity to be active in its execution : There was no consideration for the agreement, as all the debt was to be paid, and Harrison's executors could not release the costs of the plaintiff in *Tomkies' adm'r v. West's adm'r & others*.

ALLEN and DANIEL, *Js.* concurred in the opinion of MONCURE, *J.*

DECREE AFFIRMED.

Richmond.

MARTIN, *adm'r*, &c., v. KIRBY, *adm'r*, &c. & *als.*1854.
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May 1st.

1. In a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of the expression of a particular intent on the part of the testator, the survivorship has relation to the death of the testator.
2. Testator gives all his estate, real and personal, to his wife, for and during her widowhood: And he directs that at her death all his estate shall be sold and equally divided between all his surviving children or their heirs. **Held:** That the children living at the death of the testator took a vested interest in the estate.

This was a bill filed by John T. Martin, administrator *de bonis non* with the will annexed of John Piggott deceased, to obtain a construction of the will of said Piggott, and directions in the distribution of the estate. John Piggott died in 1809. By his will, after directing the payment of his debts, he gave to his wife, Hannah Piggott, for and during her widowhood, all his estate, real and personal: But if she should die before his youngest son Robert came of age, his executor should make provision out of his estate sufficient to board and school him until he arrived at the age of sixteen years; at which time he was to be bound out to a trade. He gave to his grand son, John Cowles, one hundred dollars when he arrived at the age of twenty-one years. And then came this clause:

“And lastly, my will and desire is, that my whole estate shall be sold at the death of my wife, and equally divided between all my surviving children or their heirs.”

The testator had lost one child (Mrs. Cowles) before he made his will; and at the death he left a widow and seven children. The executor paid off the debts

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and put Mrs. Piggott into possession of the estate, which consisted of both real and personal property; and she retained possession until her death in 1844. In the mean time all the children had died, some of them leaving children, others intestate and without children, and one had in his life time conveyed his interest in his father's estate in trust to secure a debt.

After the death of the widow, John T. Martin qualified as administrator *de bonis non* with the will annexed of John Piggott; and having sold all the property, he applied to the court to give a construction of the will, and direct the distribution of the fund. When the cause came on to be heard, the court below held that all the children of John Piggott who survived him took vested interests under the will, and decreed distribution accordingly. And from this decree Martin applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.

Steger, for the appellee.

LEE, J. Where a devise or testamentary gift is made to several, with words of survivorship annexed, or where the gift is to such of a class as shall survive, it becomes important to ascertain to what period the words of survivorship are intended to refer. Where no previous particular estate is interposed, but the gift is to take effect in possession immediately on the death of the testator, the established rule of construction is, to refer the words of survivorship to that event, and to regard them as designed to provide against the contingency of the death of the objects of the testator's bounty in his life time. Where, however, the gift is not to take effect in possession immediately upon the death of the testator, but a previous estate for life, or other particular estate, is interposed,

there is much greater difficulty in determining the construction by which the period of the survivorship is to be ascertained. The cases on the subject are numerous, and would seem not to be by any means all accordant. Indeed there would seem to have been a marked change in the current of the English decisions bearing upon it. In the earlier cases, almost without an exception, it will be found that the words of survivorship have been held to refer to the period of the testator's death. *Wilson v. Bayly*, 3 Bro. Par. Cas. 195; *Stringer v. Phillips*, 1 Eq. Cas. Ab. 293; *Rose v. Hill*, 3 Burr. R. 1881; *Roebuck v. Dean*, 2 Ves. jun. R. 265; *Perry v. Woods*, 3 Ves. R. 204; *Maberly v. Strode*, 3 Ves. R. 450; *Brown v. Bigg*, 7 Ves. R. 279; *Garland v. Thomas*, 4 Bos. & Pul. 82; *Edwards v. Symonds*, 6 Taunt. R. 213; *Long's lessee v. Prigg*, 8 Barn. & Cress. 231, 15 Eng. C. L. R. 206. On the other hand, numerous cases are to be found affirming a different rule, and referring the words of survivorship to the death of the tenant for life, or other prior particular estate. Such are the cases of *Brograve v. Winder*, 2 Ves. jun. R. 634; *Newton v. Ayscough*, 19 Ves. R. 534; *Hoghton v. Whitgreave*, 1 Jac. & Walk. 146; *Daniell v. Daniell*, 6 Ves. R. 297; *Wordsworth v. Wood*, 2 Beav. R. 25, 17 Eng. Ch. R. 26; *Cripps v. Walcott*, 4 Madd. R. 11; *Pope v. Whitcombe*, 3 Russ. R. 124, 3 Cond. Eng. Ch. R. 323; *Gibbs v. Tait*, 8 Sim. R. 132, 11 Cond. Eng. Ch. R. 359; *Brown v. Lord Kenyon*, 3 Madd. R. 410; *Neathway v. Reed*, 17 Eng. Law & Eq. R. 150. It is true Judge Parker, in delivering his opinion in *Hansford v. Elliott*, 9 Leigh 79, seems to think that most of the cases may be explained upon the particular circumstances attending them, and that they are not irreconcilable with those which refer the period of survivorship to the death of the testator; and that at all events the weight of authority is in favor of that doctrine. I confess my

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examination of the English cases had brought my mind to a different conclusion. It seemed to me that many of the two classes of cases were directly conflicting and irreconcilable; and that whatever might be the safest and soundest construction, and that best adapted to promote the intention of the testator, the preponderance of the English authorities was in favor of the rule making the words of survivorship relate to the expiration of the previous particular estate, being the period of the distribution of the subject of the gift, rather than to the death of the testator.

It may admit of very grave question whether this is a subject upon which anything like a fixed rule of construction can be established. The question, and the only legitimate enquiry, is, What is the intention of the testator? As was said by Sir William Grant, in *Newton v. Ayscough*, 19 Ves. R. 534, the period to which the survivorship relates depends not upon any technical words, but upon the apparent intention of the testator, collected from the particular disposition or the general context of the will. Lord Alvanley expressed the same opinion in effect in *Russel v. Long*, 4 Ves. R. 551. And in *Cripps v. Walcott*, 4 Madd. R. 11, Sir J. Leach, speaking of the construction which refers the survivorship to the period of division, evidently considers it as only applying in the absence of a manifestation of a special intent. Where that appears it must prevail and control the construction. What may be the true intention of the testator in any case is best deduced from the terms and provisions of the will when viewed in the light of the surrounding circumstances which attended the execution. To seek to determine it by applying arbitrary rules and technical principles, with which testators, and those who write their wills, are, in a very large majority of cases, utterly unacquainted, would be most unprofitable and hazardous.

This subject came under review in this court in the case of *Hunsford v. Elliott*, above cited ; and whatever may be the rule of the English courts, this court would seem to have adopted that which refers the words of survivorship to the death of the testator ; and this is declared to be (in cases in which no special intent to the contrary is manifested) the safest and soundest construction, that most consonant to the intention of the testator, and best supported by the authorities. The bequest in that case was of the whole of the testator's personal estate to his wife during her widowhood, with a provision that if she again married, her interest was to be reduced to one-third, to be held for her life ; and at her death the personal estate was to be equally divided *among the surviving children* of the testator *thereafter named*, &c. The court (four judges concurring) held that the word "surviving" referred to the death of the testator, and not to that of the tenant for life : and so the children of the testator who survived him, but died before the death of the tenant for life, took vested estates in remainder.

It is true that Judge Parker, in delivering his opinion, (in which three of the other judges concurred,) says that if the rule were otherwise than as he had maintained it to be, he should still be of opinion that the words of the will in that case sufficiently showed a special intent that the interest should vest at the death of the testator. But he enters fully into the general question, and, upon a review of the authorities, concludes that the true rule is that of the earlier English cases, which have been hereinbefore referred to. This case must therefore be regarded as authority in cases in which no special intent appears in the will, and as ruling such as are not essentially distinguishable from it.

The counsel for the appellant insists that this case is so distinguishable from *Hunsford v. Elliott* that the

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doctrine of that case cannot be applied to this. It is true the terms of the will in that case are in some respects different from those of the will under consideration ; but I have been unable to perceive how the difference is so essential as to withdraw this case from the influence of the reasoning and the conclusions which were adopted in that. In *Hansford v. Elliott* the bequest was of personal property : here, it is a gift of real and personal property ; but it is first to be converted into money by sale, and in that form divided. In that, the limitation was to individuals by name : here, it is to the surviving children as a class. But from the case of *Long's lessee v. Prigg*, 8 Barn. & Cress. 231, which was a case of a devise to surviving children as a class, we see that no difference in the result will flow from this distinction ; the same doctrine being held applicable to devises to individuals *nominatim* and as a class. In *Hansford v. Elliott* the property is given for the comfort and support of the wife and children, and this is supposed to indicate an intention to vest the estate in the children to be supported. The inference is of little cogency at best ; but a similar feature may be traced in the present case ; for from the provision in favor of his son Robert, in the event of the death of his wife before he should be old enough to be bound as an apprentice, the testator would seem to intend that the mother should make provision, out of the means left to her, for the wants of such of the children as needed her assistance. That no disposition is made by the will in this case of the whole or any part of the property given to the wife during her widowhood, in case of her second marriage, is a circumstance of little weight as tending to evince the intention of the testator. He may have used the expression "during her widowhood" in the sense of "during her life," not anticipating the contingency of a second marriage ; and this would seem not improba-

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ble from the fact that the provision for Robert, which immediately follows in the same sentence of the will, is only in the event of the wife's death before he attained the age of sixteen years, no allusion being made to the possibility of her second marriage; whereas there would seem to have been exactly the same reason for such a provision in the latter event as in the former. Such, I incline to think, is the meaning which should be given to the words "during her widowhood"; but if they are to be construed according to their literal import, so that the estate given to the widow would be held to be determined upon a second marriage, I think no such embarrassment would result as the counsel seems to suppose. The remainder being vested, would not be void, but the effect would be to hasten the period of distribution by substituting that of the second marriage of the wife for that of her decease.

The argument drawn from the consideration that in *Hansford v. Elliott*, if none of the children had survived the tenant for life, a total intestacy would have been the consequence, (a result which the testator could not be supposed to have intended,) while in this case the construction contended for by the counsel would not be attended with such a result, can have little force or effect to withdraw this case from the influence of the reasoning in the former. It is a sufficient answer to it to remark, that such an intestacy would not be the result of either construction contended for in this case. Indeed, one of the reasons which suggests itself for the preference of the rule which refers words of survivorship to the death of the testator to that which looks to the death of the tenant for life, is, that in a large majority of cases the former will be less likely than the latter to occasion a total intestacy, and thus bring about a state of things which the testator manifestly did not intend to exist.

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It is true that in the cases of *Brograve v. Winder*, *Hoghton v. Whitgreave*, and *Newton v. Ayscough*, as in the present case, the property was directed to be sold and the proceeds divided at the death of the tenant for life. But I can perceive no particular significancy in this circumstance as bearing upon the question who were the objects of the testator's bounty. All that is fairly to be deduced from it is, that the testator chose that the property should be kept together, and his wife continue to use it, in the same condition in which he should leave it, and in which she with him had been previously accustomed to enjoy it. But whatever weight might be attached to it where the property consisted of consols or other stocks, as in the cases of *Newton v. Ayscough* and *Neathway v. Reed*, I think it can have little force in a case like the present, where the property consisted of land and negroes and other articles of personal property. That a testator, after giving such property to his wife during her life, should direct it to be sold at her death, and the proceeds divided among his surviving children, does not, in my judgment, furnish any indication that his meaning was to restrict his bounty to those of them who should chance to be then still living, to the disinherison of the families of such of them as should have died before the death of the tenant for life.

It will be seen in a learned work on the subject of wills, (2 Jarm. on Wills 647,) the author regards such a provision in a will as furnishing no real distinction between it and the cases in which the words of survivorship had been referred to the death of the testator. And he attributes to Sir William Grant probable disapprobation both of the reasoning which led to the adoption of the rule in those cases, and of this distinction (without a difference) which had been engrafted upon it by Lord Loughborough. The case to which he refers as evincing the view probably entertained by Sir William Grant, is *Daniell v. Daniell*, 6 Ves. R. 297.

I think, therefore, the circumstances relied on fail to show any special intent, on the part of the testator in this case, in the use of the words "surviving children," to refer them to the death of the tenant for life; and that the case cannot be distinguished, in any essential particular, from *Hansford v. Elliott*. I think, too, the rule prescribed in that case (so far as any rule can be applied to a subject of this character) is perhaps the soundest and safest rule, and best adapted, in a large majority of cases, to promote the intention of testators. But whatever might be my opinion as to this, I think it should be adhered to as the settled doctrine of this court, notwithstanding the different result of the recent English cases.

In the case of *Hansford v. Elliott*, President Tucker dissented from the opinion of the other judges upon this question. But it will be observed, upon examining the opinion delivered by him, that had that case contained a particular feature which is found to exist in this, he would have concurred in the judgment of the court. He said that if it had appeared the testator had lost a child before the date of his will, the natural construction of the word "surviving" would be to refer it to that event. In this case, it does appear that the testator had lost a daughter, Mrs. Cowles, before the making of his will, and that circumstance was doubtless in his mind at that time, because he makes a bequest of one hundred dollars to her son. And according to the opinion of Judge Tucker, the expression "surviving children" should be construed to mean those who were living at the date of the will; who would thus take a vested interest at the death of the testator. In the case of *Neathway v. Reed*, Lord Justice Knight Bruce seems disposed to give the same construction to the words of survivorship which is given by Judge Tucker in the case supposed by him, and which is the actual case here. It is unnecessary,

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however, to consider the case in this view any farther, because it does not appear that any change took place in the condition of the testator's family between the date of his will and his death, so that the same persons would be designated by the words "surviving children," whether they be referred to the one period or to the other.

In conclusion, I would remark that the particular bequest under consideration cannot be read in the sense given to it by the construction contended for by the appellant's counsel, without a plain departure from the literal import of the terms employed. Those terms are "between all my surviving children, *or their* heirs." Heirs of whom? Certainly not of any child or children that might be living at the death of the tenant for life. *Nemo est hæres viventis*. The appellant's counsel says the terms used are not to be understood according to their literal import, and that the true meaning is that the property is to be divided between such of the children as should be living at the death of the tenant for life *and* the heirs or descendants of such as should have died; the latter to take *per stirpes*, unless all the testator's children should then be dead, in which event the grand children would take *per capita*. But this construction would embrace exactly the same persons as participants in the testator's bounty as if he had said, "to my children and their heirs," entirely omitting the word "surviving," and changing "*or*" into "*and*." Yet some effect must be given to this word "surviving," because some meaning must, if possible, be assigned to every word in the will. Turner, lord justice, in *Neathway v. Reed*. I take it, that where some meaning can be given to a word, it must receive it, unless it will occasion some incurable repugnance between different parts of the will, or violate the plain intention of the testator. And although it may be admissible to replace the disjunctive with

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the conjunctive, if necessary to effectuate the testator's intent, such necessity must first be clearly shown to exist. According to the appellant's reading of the will, the word "surviving" does not serve to designate the persons who are to take in remainder, which is its natural and proper function; but, if it have any effect, it is to convert what would otherwise be a vested interest into a contingent remainder, against the known preference of the law to construe an estate to be the former rather than the latter. On the other hand, if we will suppose that the testator, in using the words "*my surviving children, or their heirs*," could not have had in mind only those of his children who should be living at the death of the tenant for life, but must have intended to provide for the children or descendants of such of them as, though then surviving at the date of the will, or who might be surviving at his decease, might yet die in the life time of the tenant for life, all difficulty is avoided, and the natural and literal import of all the words used is preserved; and the effect is to confer a vested interest upon all the children who were living at the death of the testator.

I am of opinion to affirm the decree.

ALLEN, MONCURE and SAMUELS, *Js.* concurred in the opinion of *Lee, J.*

DANIEL, *J.* dissented.

DECREE AFFIRMED.

Richmond.

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CALLIS & als. v. KEMP & als.

May 9th.

1. In ejectment the jury set out the wills of a grand father and father; and if the son who is dead took under his father's will, they find for the plaintiff: If he took under the grand father's will, they find for the defendants. The verdict is sufficiently certain; and submits the single question upon the construction of the wills to the court.
2. Though in ejectment the plaintiffs in their declaration claim the whole of a tract of land, the jury may find for the plaintiffs for an undivided interest in it.
3. Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries; but the interest being certain, that is sufficient.
4. In 1799 testator lends to his son B a tract of land during his natural life; and if he should die without lawful issue, testator gives the land to his grand son H B, to him and his heirs forever. "But should my son B leave lawful issue, my will and desire is that he may dispose of said land to such of his issue as he may think fit." **HELD:** That B took an estate tail in the land, which by the statute was converted into a fee.

This was an action of ejectment in the Circuit court of Gloucester county, by the lessee of Kemp and others against James Callis and others. The declaration claimed four several tracts of land, one of which is described as containing five hundred acres, more or less, known as Summers' or Seymour's, formerly Da-mold's, and it also claimed a water grist mill known by the name of Burton's mill, and land attached thereto, containing twenty-four acres.

On the trial the jury found generally for the plaintiffs twelve undivided thirteenths of three of the tracts described in the declaration; and they found for the plaintiffs twelve-thirteenths of one-half of the grist

mill and the land attached thereto. They further found that Philip H. Burton, under whom the plaintiffs claimed, at the time of his death, was an infant under the age of twenty-one years, and possessed of and entitled to one other tract of land in the plaintiffs' declaration mentioned and described as containing five hundred acres, more or less, known as Summers' or Seymour's, formerly Damold's, and the remaining half of the grist mill known as Burton's mill, and the remaining half of the tract of land thereto attached, being about twelve acres. That the said tract of five hundred acres, known, &c., and the said last mentioned half part of the mill and land thereto attached, were devised by Henry H. B. Burton, who was the grand father of the said Philip H., in the year 1799, in manner and form following:

"I lend to my son, Henry Burton, the tract of land which I purchased, which was a part of the late Dr. Summers' estate (formerly Damold's), during his natural life; and if he should die without lawful issue, I give and devise the said tract of land to my grand son, Henry Burton, to him and his heirs forever: But should my son Henry leave lawful issue, my will and desire is that he may dispose of said land to such of his issue as he may think fit. I likewise lend to my son, Henry Burton, during his natural life, my half of the mill that was purchased of Captain Charles Tomkies; and if he should die without lawful issue, I give my half of the above said mill to my son Simon Burton's sons, Charles and Henry, to them and their heirs forever: But should my son Henry leave lawful issue, it is my will and desire that he shall have the power to dispose of his part of the above said mill to any of his issue he shall think fit." The jury find further that said Henry Burton took possession of said tract of land known as Summers', &c., and half of the said mill called Burton's, under the will of his father, Henry

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H. B. Burton, and remained in possession thereof until his death ; and they set out his will *in hæc verba* ; by which, after a legacy of three slaves, all his stock and household furniture to his wife, he gives the residue of his estate, real and personal, to his son, Philip H. Burton ; and expresses it as his wish that his wife shall keep the whole of his estate together until his son arrived at the age of maturity, for their support and his education. The jury further found that Mrs. Burton died before the institution of this suit ; that Philip H. Burton was the legitimate child of Henry Burton, and that he died an infant before this suit was instituted. And they found that if the law be, under the foregoing facts, that Philip H. Burton derived title to the said tract of land, known as Summers', &c., and the last mentioned half of the mill and tract of land, under the will of his father, Henry Burton, then they found for the plaintiffs twelve-thirteenths of the undivided tract called Summers', and twelve-thirteenths of the last mentioned one-half of the said mill and land thereto attached : But if the law be that Philip H. Burton derived his title to this land and half of the mill and land thereto attached by virtue of the will of his grand father, Henry H. B. Burton, then, as to the tract known as Summers', and the last mentioned half of the mill and the land thereto attached, they found for the defendants.

Upon this verdict the court below rendered a judgment for the plaintiffs ; and the defendants applied to this court for a *supersedeas*, which was awarded.

R. T. Daniel, for the appellants, insisted :

1st. That the special verdict was too uncertain and defective to warrant any judgment thereon. It is found that Philip H. Burton died an infant, seized of the property in controversy, having derived the same from his father's or his grand father's will, according

to the construction of these instruments. The verdict does not find the relationship of the lessors of the plaintiff to Philip H. Burton, which will entitle them to take under the 11th section of the statute of descents; but simply that they claim under Philip H. Burton. If the lessors of the plaintiff are descendants of Henry H. B. Burton's (the grand father) brothers or sisters, and not of Henry Burton's (the father) brothers or sisters, then they are not the class of persons described in the statute entitled to take in exclusion of the kindred on the part of the mother of Philip H. Burton, the infant; which kindred the defendants may be, although that matter is also omitted from the finding of the jury. If the lessors are not the persons described in the 11th section of the statute of descents, then it is wholly unimportant whence Philip H. Burton, the infant intestate, derived the property; for it will go as if he had died an adult, viz: to the defendants, supposing them to be brethren of the half blood *ex parte materna*, and the lessors to be only grand uncles and aunts or their descendants *ex parte paterna*. The consanguinity of the lessors and the defendants should have been found by the jury. A special verdict leaves no room for presumption. *Bolling v. The Mayor of Petersburg*, 3 Rand. 563. No material fact can be supplied by intendment. *Tunnell v. Watson*, 2 Munf. 283. And though a verdict may find generally for either party, dependent upon a particular point of law, and such verdict is not strictly a special verdict, (*McMichen v. Amos*, 4 Rand. 134,) yet the facts on which the question depends must be so stated as to enable the court clearly to resolve the question. This is a special verdict, not a general verdict with a point of law reserved.

2d. That the special verdict finds no possession in the defendants. *Cropper v. Carlton*, 6 Munf. 277.

3d. That the finding was defective in awarding

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twelve-thirteenths of the property, the whole being demanded, and not finding as to the other thirteenth, or who held it.

4th. That under the true construction of the clauses of the will of Henry H. B. Burton, the grand father of the infant intestate, in regard to the estates therein referred to, executory limitations are created in favor of the issue of Henry Burton, the son, and not estates tail in Henry Burton, turned into a fee by the statute. The estate is given for life to Henry Burton, with remainder over to others by name, in the event that Henry Burton did not by will leave the property to some of his issue. The language of the will shows plainly that the term *issue* is not used as indicating persons who were intended to take under the will absolutely; but only as persons among whom Henry Burton might exercise the power of appointment vested in him by the will. That power he exercised in favor of his son, Philip H. Burton, who therefore took not from his father, but from his grand father.

Robinson, for the appellees :

Upon the first and second points made by the counsel for the appellants, he insisted that the verdict was not a special verdict; but was absolute as to some parts of the subject, and as to another part submits a single question to the judgment of the court. That the principle was similar to that in *McMichen v. Amos*, 4 Rand. 134. On the third point made, he referred to 1 Rob. Pr. 461.

On the fourth point made by the counsel for the appellants, he insisted, that although the devise was to Henry Burton for life, yet the estate was given after his death to his issue; and by the rule in *Shelley's Case* this is the same as if given to him and his issue. 2 Jarm. on Wills 335. And that clearly creates an estate tail. Id. 236; 2 Lomax Dig. 225; 3 Lomax

Dig. 203-4; Id. 207, pl. 11. That it was clear under these authorities that Henry Burton took an estate tail: And this was converted into a fee by the statute.

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ALLEN, *P.* In the errors assigned in the petition and the argument of counsel, an objection was taken to the verdict as being too uncertain and defective. The finding is a general one for the plaintiff, unless, upon a single point of law reserved, the court should be of opinion that the law is for the defendants in respect to a portion of the land claimed in the declaration and described in the verdict. Such a verdict was held to be regular and proper in the case of *McMichen v. Amos*, 4 Rand. 134. The question was directly presented in that case, and decided; and the character of the suit, a pauper case for freedom, in which form is disregarded, had no influence on the decision of this point. Judge Cabell, in giving the opinion, in which the other judges concurred, says that such a verdict is a "conclusion drawn by the jury from the facts, in favor of one or the other party; subject, however, to the opinion of the court on the case specially stated by the jury. Such a general conclusion for one party necessarily carries with it the idea that that party must prevail unless the law upon the special case referred to the court shall be against him. All facts not found in the special case are excluded from the consideration of the court, or negatived by the general finding in his favor." In this case the jury has found for the plaintiffs if Philip H. Burton took under his father's will, and for the defendants if his title was derived under his grand father's will. The title of Philip H. Burton, as derived from one or the other source, is to be regarded as an established fact; and it being further found that the said Philip H. Burton died an infant, the verdict also necessarily establishes that the lessors of the plaintiff stood in such relation

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to him as that, under the act of descents of 1819, they were entitled to succeed to him if he took under the devise of his father; and the wills of the grand father and father are both set forth in the verdict. All the facts, therefore, to enable the court to determine this question, are set forth with precision.

And so as to the second error assigned, that the special verdict finds no possession in the defendants. By the general finding all facts necessary to entitle the plaintiff to a verdict are to be considered as found, subject to the opinion of the court on the case specially stated.

As to the objection that the verdict is defective in finding for the plaintiff twelve-thirteenths of the property, the whole being demanded in the declaration, and containing no finding as to the other thirteenth: It is not necessary that the plaintiff in ejectment should recover all that is demanded in the declaration. He may recover less. *Clay v. White*, 1 Munf. 162; *Ablett v. Skinner*, 1 Siderfin 229; *Burgess' lessee v. Purvis*, 1 Burr. R. 326; *Lewis' lessee v. McFarland*, 9 Cranch's R. 151. And though where less is recovered than was demanded, the boundaries of the part recovered should be designated, where, as in this case, the verdict was for an undivided interest, no boundaries could be designated; but there is no uncertainty as to the interest recovered. The sheriff would under the execution give possession of the undivided interests recovered, leaving the defendants in possession of the residue. *Roe ex dem. Saul v. Dawson*, 3 Wils. R. 49.

On the merits it is maintained that upon the will of Henry H. B. Burton, the grand father, and under what it is argued amounts to an appointment to Philip, in the will of Henry the son, Philip took under the will of his grand father a fee simple estate: The person taking under a power deriving his estate not from the person executing the power, but under the original

devise creating the power. The grand father by his will lent the land in controversy to his son during his natural life. The case referred to of *Williamson v. Ledbetter*, 2 Munf. 521, decides that the use of the word *lend* is not of itself sufficient to confine the limitation to the period of the devisee's death. For whether the word *lend* or *give* is used, an estate for life is vested in the first taker. The will contains no express devise to the heirs or heirs of the body, nor is any estate given directly to the issue: the issue must take by implication.

The will provides that if the son should die without lawful issue, he gave the lands to his grand son, to him and his heirs forever. The testator intended to give something by this clause to the grand son; but the interest so intended to be given was made to depend on the son's dying without issue. Taking these words alone, it is clear the testator intended that his son should take such an estate for life in the first instance as would be transmissible to his issue; and to effectuate that intent, the words "die without issue" have always been construed as controlling the previous devise for life, and as enlarging the estate from an estate for life to an estate tail. The testator, although he gave but a life estate to the son, clearly intended that the grand son should not take whilst there was any issue of the son; and there being nothing to limit the devise to the issue living at the testator's death, the words must be referred to an indefinite failure of issue. The words "should his son leave lawful issue, he might dispose of his land to such of his issue as he may think fit," do not of themselves show an intention to restrict the previous words to a failure of issue at the death of the first taker. In cases of personal property, words of that description may have been received as evidence of an intention to restrict the words "dying without issue" to a failure of issue at

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the death ; but such construction of the words has not been extended to real property, as it would defeat the leading intent to provide for the issue so long as there should be any issue. *Blackborn v. Edgley*, 1 P. Wms. 605 ; *Soulle v. Gerrard*, Cro. Eliz. 525 ; *King v. Mel-ling*, 1 Vent. 230 ; S. C. 2 Levinz 58 ; *Atkinson v. Hutchinson*, 3 P. Wms.. 258 ; *Forth v. Chapman*, 1 P. Wms. 663.

That the power of disposing to such of his issue as he should think fit would not operate to restrict the general words, is shown by the case of *Ball v. Payne*, 6 Rand. 73, where a similar power of disposing amongst or to either of the heirs of the body was contained in the devise, but the tenant for life was held to take an estate tail, which by our statute was converted into an estate in fee simple. Upon the whole, it seems to me that according to the cases of *Bells v. Gillespie*, 5 Rand. 273 ; *Broaddus v. Turner*, 5 Rand. 308 ; *Jiggetts v. Davis*, 1 Leigh 368, and the cases there referred to, the son in this case took an estate tail by implication, which by the statute was enlarged into a fee ; and that the estate so vested in Henry Burton passed by his will to his son, Philip H. Burton, who thus derived title under the will of his father, and not under the will of his grand father, by the supposed appointment in the will of his father.

I think the judgment should be affirmed.

The other judges concurred in the opinion of
ALLEN, J.

JUDGMENT AFFIRMED.

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COLVIN v. MENEFEE.

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1. An instruction given by the court, which, upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment.
2. A deed of trust given to secure a debt provides that the grantor shall hold possession of the property until a certain day. Before that day the grantor makes an agreement under seal with a third person, by which he agrees to take a certain price for the property; and if the money with its interest was not returned within twelve months, the agreement was to stand as a bill of sale; and he delivers possession of the property. The trustee, who has had no notice of this agreement, takes possession of the property and sells it, within five years from the time to which the grantor was entitled to hold it, and within five years of the time which the agreement gave the grantor to return the purchase money; but not within five years of the time of the sale and delivery of the property to the party under the agreement. **HELD:** The title of the purchaser of the grantor was not protected by the lapse of time, and the trustee was entitled to take possession and sell under the trust deed.

This was an action of *assumpsit* in the Circuit court of the county of Rappahannock, brought by James M. Colvin against Alexander F. Menefee. The object of the suit was to recover the price of a slave named Milley, which had been sold by Menefee as trustee in a deed, and which Colvin claimed to have been his property.

On the trial of the cause the defendant asked for an instruction, which was given by the court; and the plaintiff excepted. The bill of exceptions showed, that by a deed bearing date the 5th of August 1837, William Harmons conveyed to Menefee certain real and personal property, of which the slave Milley was a part, in trust to secure certain debts therein speci-

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fied ; and the deed provided that Harmons should be permitted to retain possession of the property until the 1st of August 1839. This deed was duly recorded in the clerk's office of the County court of Madison, where Harmons then lived and held the said slave in his possession. On the 16th of October 1838 Harmons entered into a written agreement under seal with Colvin, by which he agreed to take two hundred and fifty dollars for the slave Milley : And if the money with its interest was not returned to Colvin within twelve months, the agreement was to stand as a bill of sale, clear of all encumbrance. This agreement was made at the house of Colvin, in the county of Culpeper, at which time the slave was in the county of Madison in the possession of Harmons or Milton Kirtley, under a temporary pledge for the loan of money from Kirtley to Harmons. Within three or four days thereafter, Harmons sent the slave Milley to Colvin, to be held by him under the contract aforesaid of the 16th of October 1838 ; and Colvin held possession of her, in the county of Culpeper, until the end of the year 1842, when he removed from Culpeper to Madison county, and carried the slave with him, and retained possession of her until the end of the year 1843, holding and claiming title to her under the said contract. Some time in the year 1843 Harmons removed from Madison to Culpeper county ; and some time in the year 1844, before the 13th of March of that year, the slave Milley was found in the possession of Harmons in Culpeper, and was taken possession of by the defendant, who sold her under the deed of trust aforesaid, on that day, for the price of four hundred and eighty-one dollars ; for the recovery of which this suit was brought. Upon this state of facts the court, on the motion of the defendant, instructed the jury, that if they believed these facts, the said Colvin was to be regarded as having constructive notice of the

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deed to Menefee, of the 5th of August 1837; and that it was not necessary for the protection of Menefee's title to have the said deed recorded in Culpeper at all. And if the jury should believe that the plaintiff held possession of the slave Milley under the said contract, his possession, so far as Menefee was concerned, was the same as the possession of Harmons up to the 16th of October 1839; and that the statute of limitations did not commence to run against the said Menefee until the 16th of October 1839: The statute runs only in cases where the possession is adverse. In this case the possession was not adverse until the expiration of one year from the date of said contract.

Under this instruction the jury found a verdict for the defendant, upon which the court rendered a judgment. And thereupon Colvin applied to this court for a *supersedeas*, which was awarded.

Morson, for the appellant:

This case comes up upon an instruction given by the court below, that in as much as the conditional sale allowed one year for the repayment of the purchase money of the slave, that this time is not to be taken into account in considering the bar of the statute of limitations. It cannot be said that there was not a conflict between the sale and the trust deed. The grantor assumed a power not given him by the deed; and the purchaser took in conflict with it: And if this be so, the plaintiff is entitled to recover in this action. The adverse holding which is contemplated is a holding with a claim of right, and with a different title from the other side; and where there is such an adverse holding the statute runs. *Bradstreet v. Huntington*, 5 Peters' R. 401.

Under the decisions of our courts it is not necessary to plead the statute of limitations in an action of detinue, and five years' peaceable possession of slaves

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gives title. *Newby's adm'rs v. Blakey*, 3 Hen. & Munf. 57; *Brent v. Chapman*, 5 Cranch's R. 358; *Shelby v. Guy*, 11 Wheat. R. 361; *Elam v. Bass' ex'ors*, 4 Munf. 301; *Garland v. Enos*, 4 Munf. 504. The court is also referred to the case of *Sheppards v. Turpin*, 3 Gratt. 373, the facts of which resemble in a considerable degree the facts of this case.

Robinson, for the appellee :

Here was a deed of trust duly recorded, which was a lien upon the property against all persons claiming under the grantor; and of which they were bound to take notice. Colvin then took no title at the time of his purchase; and he relies upon his length of possession as giving it.

The possession of the grantor in the deed was consistent with it; and so was the possession of a purchaser from him. *Rose v. Burgess*, 10 Leigh 186. That was a stronger case than the present, because in this by the deed the grantor was allowed to remain in possession. The trustee was not authorized to sell until August 1839; and he did take possession and sell within five years from that time.

The possession of Harmons, the grantor, was in trust for us; and no act of limitations could run in his favor against us. The possession of his assignee must be viewed in the same light, as he was bound to know the existence of the trust. And as Harmons had the right of possession to August 1839, and until the trustee should take possession and sell, it must be presumed that the assignee holds in the same way until by some public notorious act he sets up some other title. If a grantor in a deed may make a private sale so as to bar the trustee, then is it a very ready means to destroy trusts. But the law proceeds on the ground that a person claiming under the grantor stands in his position until he publicly disavows such possession.

When he does this, and is allowed to remain in possession for five years, then he may protect himself by the statute. He is like one coming in place of a tenant; for a grantor or mortgagor, after the time for taking possession under the deed, is a tenant at will. *Chambers v. Pleak*, 6 Dana's R. 430. And like principles are announced in the case of a trustee in *Hendrick v. Robinson*, 7 Dana's R. 165.

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The doctrine above stated is conclusive of the case, without reference to the terms of the contract. But under the contract the time did not run until the end of twelve months. The purchaser could not *bona fide* claim title until that period; and without this the possession did not vest title. *Kitty v. Fitzhugh*, 4 Rand. 600. The instruction given was in fact too favorable to the plaintiff. He proved no adverse possession either before or after October 1839; and therefore he was not entitled to the instruction that there was adverse possession at that time. It is said there was a conflict between the trust deed and the purchaser. But he must bring home knowledge of the contract to the trustee; and there is no pretence of such knowledge. The law presumes that the grantor was acting as he was authorized to do, and not as he was not authorized to do.

The case of *Sheppards v. Turpin*, 3 Gratt. 373, is in strict conformity to the principles which have been stated. There the property was not sold by the grantor in the deed, but by a public officer, who had taken it under an execution, and sold it at public auction.

Morson, for the appellant, in reply :

The authorities cited by the counsel for the appellee belong to a class of cases essentially different from that before the court. They relate to the relation of landlord and tenant or trustees. This is of a wholly dif-

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ferent character. Here there is no privity between Colvin and the trustee. The title he takes is an adverse title in its inception. This was not an agreement to vest the title at the end of the year if the money was not repaid; but it vested the title at once, and only vested in Harmons the right to repurchase within a year. Harmons alone had the right to do this: Colvin could not compel him to do it.

It is true that the claim of title must be open and proved: And the bill of exceptions states that the possession was held from within three days of the day of sale under a claim of title. One of the canons of the law as to personal property is, that possession is indicative of title; and here there was this possession, with a conveyance of the property by deed. To constitute an adversary possession, it is only necessary that it shall be with claim of title; not that the title claimed shall be good. *Shanks v. Lancaster*, 5 Gratt. 110. And with reference to the statute of limitations, courts do not enquire when the rights of the plaintiff were acquired, but when the defendant's possession accrued. If the party in possession has held five years, that protects him; for if his possession is tortious, there must be some party entitled to seek redress for it.

DANIEL, *J.* The counsel for the defendant insists, that though the instructions of the Circuit court may have been erroneous, yet this court ought not therefore to reverse; in as much as the supposed error could not have been prejudicial to the plaintiff. He refers to that provision of the deed by which Harmons is permitted to retain possession of the slave till the 1st day of August 1839; and says that the trustee had no right to sell under the deed, and was not bound to institute any action to recover the possession of the slave, until the day last mentioned; and that as he

obtained the possession and made the sale within five years thereafter, the possession of the plaintiff had not, at the date of the sale, matured into a title to the slave, or the proceeds of her sale.

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I do not think that this view of the case has been successfully met.

It is true that the bill of exceptions does not purport to set out all the evidence in the cause; and it is also true that it is not necessary for a party excepting to instructions to state any facts except such as are necessary to present the precise point ruled against him and excepted to; and that it thence follows that the action of the appellate court is properly restricted (as a general proposition) to the consideration of the question of law so raised by the facts, and alleged by the party excepting to have been erroneously decided against him in the court below. Yet I apprehend it is equally true that the facts thus exhibited must disclose an error material to the issue, and operating to the prejudice of the party excepting; that the party asking the reversal of a judgment, on the score of an erroneous instruction on the trial, must at least show that he had probably sustained injury thereby.

Now, I do not perceive in what regard the plaintiff could have been injured by the instructions. The injury which he imputes to them is, that they cut him off from making a case on his five years' possession. But the facts which he sets out for the purpose of exhibiting the supposed error of the court show at the same time that the fate of his case, as resting on that foundation, must have been the same, though the instructions had not been given. For there is no proof that the trustee had any notice of the transaction between Harmons and the plaintiff, or of the removal of the slave from the county of Madison; and Harmons having, by the express terms of the deed, a right to retain the possession till the 1st of August 1839, I

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hold it to be clear that the statute of limitations could not begin to run against the trustee till that period. *Joyner v. Vincent*, 4 Dev. & Bat. 512.

The plaintiff consequently could not have been prejudiced by the decision of the point ruled against him: For whether we refer the commencement of the running of the limitation to the period fixed by the instructions, on the 16th of October 1839, one year after the date of the agreement between Harmons and Colvin, or to the 1st of August 1839, the result is the same. The sale by the trustee in the spring of 1844 was, in either aspect, before he had lost his right to maintain an action for the recovery of the possession of the slave. The plaintiff's own statement of his case thus showing that his possession and claim of title had not, by lapse of time, ripened into a perfect right to the property, as against the trustee, at the time of the sale, his claim to recover the proceeds of her sale, as founded on his adversary possession, must consequently have failed, though the instructions had not been given.

As this view of the case disposes of it, it becomes unnecessary to consider other questions discussed at the bar.

I am for affirming the judgment.

The other judges concurred in the opinion of DANIEL, J.

JUDGMENT AFFIRMED.

Richmond.**WILLIAMS v. WILLIAMS & als.**1834.
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W, who is a creditor of T, qualifies as his administrator, and exhausts the personal estate in payment of debts, leaving himself still a creditor. The heirs of T file a bill in the County court for the sale of his land, and the same is sold upon a credit, and a part of it is purchased by W, who executes his bond for the purchase money. W then files his bill in the Circuit court to enjoin the payment of the purchase money of the land to the heirs, claiming that he is entitled to have it applied in satisfaction of his debt.

HELD:

1. That W is entitled to have the proceeds of the land applied to the payment of his debt.
2. That the injunction should only go to restrain the payment of the purchase money to the heirs of T; and should not restrain the collection of the money by the County court.
3. Although it would have been more regular for W to connect himself, by petition or bill, with the proceedings in the County court, in which the fund had been realized, yet there is no serious objection to the mode of proceeding adopted by him. The County court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as may be appointed to receive it by the Circuit court: Or one of the suits may be removed to the court in which the other is pending.

In August 1847 Francis Williams filed his bill in the Circuit court of Pittsylvania, in which he charged that Thomas and Robert W. Williams, who were partners, made their negotiable note for six thousand dollars, payable to John McAlister, which was endorsed by McAlister and the plaintiff for the accommodation of the makers, and was discounted for them by the Farmers Bank of Virginia, at Danville. That the note not being paid at maturity, was duly protested, and was paid by the plaintiff. That soon thereafter Robert W. Williams and McAlister became insolvent, and Thomas Williams died. That the plaintiff qualified

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as administrator of Thomas Williams, and had disbursed the whole personal estate in the payment of debts; and that there was yet due to him upon said note, as was shown by his administration account which had been settled by commissioners of the court of probat, the sum of two thousand five hundred and seventy-eight dollars and eighty-four cents of principal and one hundred and fifty-eight dollars and ninety-seven cents of interest. He further charged that Thomas Williams owned at his death certain real estate, which he specified. That the heirs of Williams, with a full knowledge that the personal estate of their ancestor was exhausted, and that a large balance was still due to the plaintiff, had filed a bill in the County court of Pittsylvania for the sale of the said real estate; and that the same had been sold under the decree of that court. That at that sale the plaintiff had become the purchaser of one lot, at the price of one hundred and seven dollars, and had executed his bond with security to the commissioner; and that the other real estate had been sold to Lewis Hall, for one hundred and ninety-one dollars, who had likewise executed his bond for the amount to the commissioner. That the said commissioner had since died, and there was no representative of his estate. That the said heirs had little or no estate of their own; and notwithstanding the large debt due to the plaintiff, they threatened to enforce payment of the purchase money for the lot purchased by him, and also to collect the amount due from Hall. That he was advised that he was entitled to have the proceeds of the real estate of Thomas Williams applied to the satisfaction of the debt due him. And making the heirs of Thomas Williams and Hall and his surety parties defendants, the plaintiff asked that the heirs might be enjoined from collecting the said purchase money, and that Hall and his surety might be enjoined from paying to them; and that the

proceeds of said real estate might be applied in part satisfaction of the debt due to him; and for general relief.

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The injunction was granted: But on the motion of the defendants, without filing an answer, the court dissolved the injunction. And thereupon the plaintiff applied to this court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.

There was no counsel for the appellees.

MONCURE, *J.* delivered the opinion of the court:

The court is of opinion that the appellant's bill makes out a good case for equitable relief, and entitled him to an injunction to prevent the widow and heirs of the intestate, Thomas Williams, from receiving the purchase money of his real estate, but not to prevent the collection of the money under the order of the County court. The suit in that court was instituted before the appellant's suit in the Circuit court; and the latter should not interfere with the former suit, except to prevent the payment of the money to the widow and heirs until the appellant's claim can be adjudicated. It would perhaps have been more regular if the appellant, instead of bringing his suit in the Circuit court, had connected himself, by petition or bill, with the proceedings in the County court, in which the fund had been realized. But the course which he has pursued is free from serious objection, and need not occasion any conflict of jurisdiction between the two courts; as the County court, instead of directing the money to be paid to the widow and heirs, can direct it to be paid to such person as may be appointed to receive it by the Circuit court. Or if it be more convenient to have both suits in the same court, that object can be effected by a removal of one of them into the court in which the other is pending.

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Code, ch. 174, p. 657. The court is therefore of opinion that the court below erred in dissolving the injunction *in toto*, without plea or answer, instead of dissolving it in part and overruling the motion as to the residue, according to the principles above indicated. It is therefore decreed and ordered, that so much of the order of the court below as is above declared to be erroneous, be reversed, and the residue thereof affirmed, with costs to the appellant against the appellees, who are heirs of the said Thomas Williams; and the cause is remanded for further proceedings.

DECREE REVERSED.

Richmond.**B. STATON v. PITTMAN, *sheriff*.****PITTMAN, *sheriff*, v. R. STATON.**1854.
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Judgments had been recovered against N, and executions sued out thereon had been returned "no effects." In this state of things, slaves sold at public auction on a credit were cried out to N, and he induced T to take them and give his bond for the price, upon the understanding that N would afterwards take them and pay T the price; and he told T he was indebted to his sister R for washing, mending, &c., and owed her a good deal of money, and he wished to give the slaves to her as compensation for what he owed her. T kept the slaves about three months, and then N paid T the price of the slaves, and T gave N a receipt in the name of R; and a day or two afterwards T sent the slaves to the house of B, the father of R, where R then lived, she being about fourteen years old; and the slaves and R both remained there, she claiming them as hers, but it not appearing that B set up any claim to them. Whilst the slaves were thus at the house of B, the sheriff attempted to levy upon them as the property of N, but when he came in sight the doors of the servants' houses were shut. Afterwards N was taken on a *ca. sa.* and took the insolvent debtor's oath; and then the sheriff brought separate actions of detinue against B and R to recover the slaves.

HELD:

1. The arrangement by N was fraudulent as to his creditors.
2. Though N never had possession of the slaves, yet, as he paid the purchase money to T, they became the property of N, upon which his creditors would have been entitled to levy their executions; and the subsequent transfer of the possession to R without consideration, and upon a fraudulent arrangement between N and R, did not bar the action of the sheriff for the slaves.
3. Though R was an infant when the action was instituted, yet as she did not set up her infancy to defeat the action, and as it may be reasonably inferred from the evidence that she was of full age when the cause was heard upon a demurrer to evidence, and appeared and defended herself by counsel, she is bound by the judgment.
4. Though the slaves were sent to and remained on the premises of B, yet as his daughter R also lived there, and R claimed the slaves, but it did not

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appear that Bever claimed them, the action cannot be maintained against B.

5. Upon the trial R, to prove that she gave a valuable consideration for the slaves, introduced a bond executed by N to B, and assigned by B to R, before N's purchase of the slaves. On this bond there were several receipts, the last of which, for the balance of the bond, was dated before the purchase of the slaves by N, and to this receipt there were four subscribing witnesses, none of whom were introduced upon the trial. R having introduced the bond with the receipts upon it, these receipts were in evidence for the benefit of the plaintiff, without his calling a subscribing witness to prove them. And it was for R to show that there was an error in the date of the receipt.

These were two actions of detinue brought in the Circuit court of Buckingham county, one by Thomas Pittman, sheriff, who sued for the benefit of Wardsworth, Williams & Co., against Benjamin Staton; and the other by the same plaintiff for the same parties, against Rosetta Staton. The object of both suits was to recover the same two slaves.

The two cases were tried together, and the jury found verdicts for the plaintiff, subject to demurrers to the evidence by the defendants. It appears from the evidence of the plaintiff that three judgments had been recovered against Nicholas Staton, the son of the defendant Benjamin, and the brother of Rosetta Staton, in September 1841, upon which executions had soon after been issued and had been returned "no effects." One of these was at the suit of Wardsworth, Williams & Co. Afterwards, in 1844, executions had been issued against the body of Nicholas Staton, upon which he was taken in custody, and took the benefit of the act for the relief of insolvent debtors, and was discharged, having surrendered a few trifling articles in his schedule. Previous to this last period, viz: on the 12th of September 1842, at a public sale made at Buckingham court-house, by W. P. Boccock as commissioner, the two slaves in controversy were bid off to Nicholas

Staton at two hundred and twenty-two dollars ; and on the same day he informed William Tapscott of his purchase, and requested him to take them, saying that he would afterwards take them and pay Tapscott for them ; and at the same time he told Tapscott that he was indebted to his sister, Rosetta Staton, for washing, mending, &c., and that he owed her a good deal of money, and wished to buy this woman and child and give them to her as compensation for what he owed her. Tapscott took the negroes and gave his bond to Bocock for the price, and kept them about three months, when Nicholas Staton paid him the purchase money, and Tapscott gave a receipt to Nicholas in the name of Rosetta Staton ; and a day or two afterwards sent the slaves to the house of Benjamin Staton. The slaves continued at the house of Benjamin Staton, where Rosetta Staton also lived ; she being at the time of this purchase by Nicholas Staton about fourteen years old. At that time Tapscott considered Nicholas Staton very good for the amount of the purchase money of the slaves, and he was always punctual in every transaction he had with him. After the slaves went to the house of Benjamin Staton, the sheriff went there to levy upon them, but after he arrived in sight of the house the doors of the out-houses were closed, and the entry of the officer prevented.

The defendants introduced Nicholas Staton as a witness, who testified that he first wanted to buy the slaves for his sister, Rosetta Staton ; that she authorized him to buy them for her ; that he owed her a bond, and she told him to buy them and she would give him credit for them ; that he did so, and paid off the whole bond. That he owed Benjamin Staton for the hire of negroes, for which he gave the bond to him. That the bond was assigned to Rosetta Staton by Benjamin, before the negroes were purchased ; and that the bond had been paid off by the purchase of

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the negroes, and a balance paid in money. That he owed Rosetta Staton on other accounts; that she had wove for him and done some sewing for him. He had never heard Benjamin Staton claim the negroes; but that Rosetta Staton had always claimed them as hers, and still did so. The bond referred to by the witness was produced, and there was no question that it was genuine, and had been given for the hire of slaves. It was dated the 1st of January 1840, and payable on the 1st of January 1841, and was for four hundred and fifty dollars. The assignment by Benjamin to his daughter, Rosetta Staton, is dated the 1st of January 1842, and purports to be a gift. There are four credits on the bond, the two first of which amount to two hundred dollars, and are not dated. The third bears date the 7th of July 1842, for a due bill on A. Long for one hundred dollars; and the fourth, purporting to be the receipt of the balance of the bond in cash, bears date the 10th of August 1842, and is attested by four witnesses, none of whom were introduced on the trial.

The court rendered a judgment upon the demurrer to evidence against Benjamin Staton, and in favor of Rosetta Staton; and Benjamin Staton in the first case, and the sheriff in the second, applied to this court for a *supersedeas*, which was awarded.

Stanard and Bouldin, for Benjamin Staton.

Morson, for the sheriff.

Irving, for Rosetta Staton.

LEE, J. It is not to be questioned that if Nicholas Staton was the legal owner of the slaves in controversy, and made the transfer to his sister Rosetta for the purpose of hindering, delaying and defrauding his creditors, the transfer was as to them utterly void; and upon his taking the oath of an insolvent debtor,

the sheriff became entitled to recover the slaves for the benefit of the creditors, from any one unlawfully detaining the possession of them. Upon this subject the case of *Shirley v. Long*, 6 Rand. 735, and *Clough v. Thompson*, 7 Gratt. 26, may be regarded as decisive. And I think the facts proven by the evidence in these causes, and the inferences which a jury legitimately might and should make from them, are such as to present a case which cannot be satisfactorily explained, except upon the hypothesis of fraud on the part of Nicholas Staton in the transaction in question. At the time of the sale made by Commissioner Bocock, he was much embarrassed with debts, there being unsatisfied judgments to a considerable amount standing against him, the executions upon which had been returned "no effects." The slaves are struck off to him as the highest bidder; but being unwilling, for a reason which we are at no loss to understand, to complete the purchase by giving the requisite bond in his own name, he gets Tapscott to take his place as ostensible purchaser, and give his bond to the commissioner for the purchase money, and receive possession of the slaves, stating that he owed his sister Rosetta for washing, mending, &c., and that he wished to give her the slaves to compensate her. That he could have given the bond and the security required, in his own name, if he had chosen, may be fairly inferred from what Tapscott states: for he says he regarded N. Staton as perfectly good for the amount of the purchase money, and he had always found him remarkably punctual in meeting his engagements with him; and no doubt he would have been as willing to become his security if Nicholas Staton had chosen to give his own bond on the credit of the sale, as he was to make himself the convenient instrument in the arrangement which Nicholas Staton preferred to adopt. Tapscott retains possession for about three months, and Nicholas

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Staton then pays over the amount of the purchase to him, taking a receipt in the name of Rosetta Staton, who was at that time about fourteen or fifteen years of age; and in a day or two after Tapscott sends the slaves to the house of Benjamin Staton, the father of Rosetta, with whom she then lived. Now it does not appear whether at this time the credit of the commissioner's sale had expired, or whether Tapscott had paid for the negroes or not; but from his silence on this point, and from the questionable position which he occupies in relation to this affair, it might not be unwarrantable to infer that he had not then paid for the negroes, and that the payment, when made, was with the funds provided by Nicholas Staton himself.

As to the pretended consideration for the transfer of the slaves by Nicholas Staton to his sister Rosetta, I think it comes in too questionable a shape to afford any sufficient support to the transaction. She was at the time a mere child, and it would seem very improbable that he could owe her any considerable sum for washing and mending. He is introduced as a witness, indeed, on the part of the defendant in the action, in each case, and he states that he purchased the negroes by the direction of this young girl, and with them paid off the balance of the bond which had been assigned to her by her father. And though he does say that he owed her on other accounts for personal services, yet this is rather auxiliary and cumulative, and the stress of the consideration is placed on the balance due on the bond. But upon the demurrer to evidence, his evidence, so far as it conflicts with that of the plaintiff in the action, is, of course, to be disregarded; and if it were even to be taken into consideration, I think it entitled to not the slightest weight. It is true, the fairness of the bond executed by Nicholas Staton to his father for the hire of the watermen, or of the assignment of it by the father to Rosetta Staton, is not im-

peached by the plaintiff, nor do I perceive anything in the evidence upon which either could be successfully assailed. The evidence of Tapscott proves that the hiring of the three negroes for the year 1840 was a real transaction between Benjamin Staton and Nicholas Staton; and the bond of the latter, produced by himself on his examination as a witness, shows that it was given for the amount of their hire. This bond Benjamin Staton had a perfect right to give to his daughter, if he chose so to do; nor is there any one here questioning or entitled to question the validity of such a gift. But when Nicholas Staton spoke of his indebtedness to his sister at the time he procured Tapscott to take his place as ostensible purchaser of the slaves, and to hold them subject to his disposal, he made no allusion to any bond held by Rosetta upon him, but intimated that what he owed her was for washing, mending, &c.; and upon examining the bond produced by Nicholas Staton, it would seem that the balance due upon it had been paid off *in cash*, on the 10th of August 1842, before the purchase by Nicholas Staton at the commissioner's sale, and some four months before he paid over the money to Tapscott. So that, however justly he may have been indebted to Rosetta on account of that bond previously to the sale, he had at that time ceased to be so, having paid off the balance, and no doubt then having the bond in his own possession.

But it is said that the receipt endorsed on the bond is not proven, and that although there are four attesting witnesses, not one was called to testify concerning it. But what need of proof on the part of the plaintiff in the action? The bond, with the receipt endorsed upon it, is produced by the defendants and their witness, and the plaintiff certainly had the right to take it as they exhibited it. And if there was a mistake in the date of that receipt, as it is suggested

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by the counsel there may be, it was for the defendants to show it, I apprehend, not for the plaintiff to show there was none.

I think the *indiciæ* furnished by the evidence, of the true character of this transaction, are such as fully to warrant a jury in finding that it was a fraudulent arrangement made by Nicholas Staton for the purpose of screening the slaves from the creditors who then held unsatisfied judgments against him, by holding them out to the world as the property of Rosetta Staton; and that she was but a too willing instrument in his hands to effect his fraudulent purpose. But whether a willing or an innocent instrument, I conceive no substantial or valid consideration is shown for the transfer of the slaves to her, and that she can take no benefit from an arrangement tainted with the fraud too justly imputed to Nicholas Staton.

But it is said Nicholas Staton never had title to these slaves: that even if there was no debt due from him to Rosetta, and the money paid to Tapscott for them was his own money and not that of Rosetta, still he never had the possession of the slaves, because they were delivered by the commissioner to Tapscott, and by him directly to Rosetta Staton; and that the most that can be made of the case is that it is one of a resulting trust in the slaves for the benefit of the creditors, which they can only enforce in equity, but of which they cannot have the benefit in an action at law for the slaves themselves, in the name of the sheriff, for want of a sufficient legal title upon which to base such an action and recovery. A purchase alone, it is argued, of the slaves, without delivery of possession, will not pass a title to the purchaser.

This view, in my judgment, cannot be maintained. As already intimated, I look upon Tapscott as but the ostensible, while I regard Nicholas Staton as the real purchaser of the slaves; and Tapscott's possession, if

(as I think a not unwarrantable inference) the slaves were actually paid for with the money provided by Nicholas Staton, might be regarded as his possession, so far as creditors were concerned, subject at most to Tapscott's right to be indemnified against the bond which he had given. But if this were going too far, clearly I think after Nicholas Staton had paid over the purchase money to Tapscott, the possession of the latter, during the interval between the payment and the delivery of the negroes to Rosetta Staton, was the possession of Nicholas Staton; and whether Tapscott had yet paid the amount of his bond to the commissioner or not, an execution against Nicholas Staton might properly have been levied upon the slaves during that interval, while yet in the hands of Tapscott. To this Tapscott could not object, for, having received the money, his interest in the slaves had ceased by his own act and consent. Rosetta Staton could have no right to object: the money paid for the slaves was not hers, and she had not yet acquired the possession of them. So that there was no one who could successfully interpose to arrest a creditor in the pursuit of this property during that period, nor could his right to subject it to his debt be defeated by a subsequent transfer, except upon sufficient consideration, and untainted by the fraudulent purpose reprobated by the law.

I am of opinion, therefore, that the plaintiff did show a sufficient right to recover the slaves for the benefit of the creditors at whose suit Nicholas Staton took the oath of insolvency, against any and all persons unlawfully detaining them; and as Rosetta Staton claims both title and possession, and wholly denies any right in the plaintiff, she is clearly liable in the action against her. Nor do I think that her infancy at the time of suit brought and plea pleaded can protect her from a judgment against her upon the demurrer to evidence. It is undoubtedly true that an infant cannot

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appoint an attorney, nor appear or plead otherwise than by guardian; but waiving the question whether the point can be made in this form, or whether the court must take notice of the infancy of the defendant whenever and however it is brought to its knowledge, it is equally true that the disability of infancy is a privilege personal to the party, and which, after he attain his age, he may well waive if he please: And such a waiver must be intended in this case. For taking the evidence most strongly, as it must be taken, against the demurrant, it may be inferred that at the time of the argument of the demurrer and the rendition of the judgment, in April 1848, Rosetta Staton had then attained her full age, and as she then proceeded by her attorney to the argument of the demurrer without making the objection of her previous infancy, it is to be considered that she waived her privilege, and sought the judgment of the court upon the merits of the case.

As it respects Benjamin Staton, however, I can perceive no just ground upon which he should be subjected to a recovery in the action against him. As I have already intimated, there is no impeachment of the fairness of the bond executed to him by Nicholas Staton, or of the assignment of the same by him to his daughter Rosetta. He is not proven to have had any connection whatever with the purchase of the slaves, or with the transfer of them to Rosetta. He has set up no claim to them in any form, nor exercised any act of ownership over them. Nor can he be said in any just sense to have had possession of them, or to have detained them from the plaintiff. That he suffered his daughter to keep the slaves that she claimed as hers at his house, where she still lived, is a circumstance too slight and equivocal of itself to charge him with the grave responsibilities of an unlawful detainer from the right owner. It is not incompatible, but strictly consistent with perfect freedom from any par-

ticipation in the fraudulent arrangement between the brother and sister, and with entire ignorance of its true character. What more natural than that a father would permit his young daughter to keep slaves, that she claimed as hers by purchase or gift from her brother, upon his premises, while she continued a member of his family? He might be totally ignorant of any vice in the arrangement between them; or, if a doubt had suggested itself, he might be neither able nor willing to take upon himself the unpleasant task of resolving it. The circumstance alluded to by the witness Haskins, of the closing of the doors of the out-houses when he approached with the sheriff for the purpose of levying on the slaves, is left in too much uncertainty to constitute a sufficient ground on which to charge Benjamin Staton. It is not shown to have been done by his authority or with his knowledge, privity or consent. It does not appear that he was even at home at the time. Nothing is shown by which he can be fairly connected with it. That the premises were his cannot make him responsible for what might be done upon them without his authority; and for aught that appears, this closing of the doors might have been the act of the negroes themselves. The plaintiff might have readily placed Benjamin Staton in his true position by demanding to know if the slaves were withheld by his authority, and might then treat him as the nature of his response should direct. He made no such call, however, upon him; and, under such circumstances, to charge Benjamin Staton with the consequences of an illegal detainer of these slaves would be, as it seems to me, to convict a man upon bare suspicion of being privy to and participant in the unlawful act of others, although remaining passive throughout, or, at most, doing what perhaps almost any other father might do in similar circumstances, in permitting a child to keep property that she claimed,

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upon his premises, whilst she was herself a member of his family. The injustice in this case would be gross and manifest. For if the plaintiff in the action should enforce his judgment against Benjamin Staton, by compelling payment of the alternative value and damages found by the jury, and the costs, he will be without indemnity of any kind. Thus he is compelled to pay a large sum towards a debt of Nicholas Staton, for which he was never in any form responsible, for which he has received nothing in the form of an equivalent, nor can claim anything in the way of indemnity: and this for a transaction in which he is in no manner implicated, and without any proof that he has in any manner obstructed the plaintiff in the pursuit of his remedies against those who were justly responsible to him.

I am of opinion, therefore, to reverse the judgment in each case; and in the case of Rosetta Staton, to render judgment against her on the demurrer to evidence, and in that of Benjamin Staton, to render judgment for the defendant.

ALLEN and SAMUELS, *Js.* concurred in the opinion of *Lee, J.*

DANIEL and MONCURE, *Js.* concurred in the opinion of *Lee, J.* as to Rosetta Staton; but they thought that the judgment against Benjamin Staton was correct.

BOTH JUDGMENTS REVERSED.

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1. A bond executed to an executor is transferred by him to a guardian as part of the ward's estate. Whatever interest the ward has in the bond is subject to the control of the guardian, who may receive the money due thereon if voluntarily paid; may sue for it in a common law court in the name of the executor, for his own use as guardian, and cannot be prevented by the executor; or he may sell and transfer the bond.
2. As a general rule, a guardian has the legal title of the ward's personal estate; and has the power and authority to sell it.
3. A guardian violates his trust when he sells or transfers the property of his ward to pay his own debt.
4. The fraud of a guardian in disposing of the property of his ward is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties.
5. A bond executed to an executor is transferred by him to a guardian as part of the ward's estate. The guardian is himself a legatee for a large amount of the same testator, and is guardian of another legatee; and he receives the amount of these legacies from the executor in bonds and other evidences of debt. Upon the marriage of the last mentioned legatee, he transfers to her husband the bond belonging to the first named ward, in part discharge of her legacy, he being at the time in good circumstances and his sureties as guardian being wealthy. The husband takes the bond at par, without knowing or suspecting that it is the property of the first named ward; and takes it without a hope of gain or fear of loss, but simply as a mode of payment convenient to both parties. Years afterwards the guardian becomes insolvent by the failure of speculations in which he is then engaged. **HELD:**
 1. The husband, who received the bond, is not responsible to the ward, whose property it was, for the amount thereof.
 2. The principle upon which a party dealing with a fiduciary is held responsible is, that he has co-operated in the fraud of the fiduciary.
6. A guardian qualifies in 1821. In 1825 he transfers a bond of his ward to a party wholly innocent of any participation in the guardian's fraud, in payment of a debt. The ward comes of age in 1832, and takes no steps to obtain his estate from his guardian until 1840, when the guardian be-

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comes insolvent. He then sues the sureties of the guardian, and recovers from them the amount due to him from his guardian. In all this time the sureties had done nothing to secure the faithful discharge of his duties by the guardian, or to compel him to pay over to the ward his estate after he came of age. **Held:** That even if the party who had received the bond from the guardian could be held responsible to the ward, he is not responsible to the sureties.

George Pottie the elder, late of the county of Louisa, died prior to April 1815, leaving a widow and five children surviving him. By his will, after giving a few small legacies, he directed that the remainder of his estate, both real and personal, should be divided between his widow and children as the law directs in cases of intestacy; and he appointed John Thompson, of Culpeper, his executor. The will was duly admitted to probat, and Thompson qualified as executor.

Several of the children of George Pottie the elder were infants, and in 1821 R. S. Sandridge qualified as the guardian of George Pottie the younger, and Nathaniel Thompson, who had previously married the widow, qualified as the guardian of Isabella Pottie. On the 28th of June of this year the executor, John Thompson, divided among the legatees the sum of forty-five thousand dollars, Nathaniel Thompson, as the husband of the widow, receiving fifteen thousand dollars, and as guardian of Isabella Pottie, receiving six thousand dollars; and Sandridge, as guardian of George Pottie the younger, also receiving the sum of six thousand dollars.

Although the receipts given by these parties purport to be for so much money, yet in fact these sums were not paid in money, but principally, if not wholly, in bonds and other evidences of debt. Among the bonds so received by Sandridge, as guardian of George Pottie the younger, was one for five thousand dollars, executed by Isaac Winston, of Culpeper, to John Thompson, executor of George Pottie, which bore date on the

13th of November 1820, and was payable on the 13th of November 1825, with legal interest, payable semi-annually. This bond was secured by a deed of trust executed by Winston and wife, conveying real estate and slaves, and was recorded in the county of Culpeper. The executor did not assign the bond, but simply transferred it, and the only endorsement upon it was one signed by the executor, of the receipt of interest upon it to the 13th of November 1821.

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In 1822 Sandridge died, and in November of that year Nathaniel Thompson was appointed guardian of George Pottie the younger. In 1823 Sandridge's account as guardian of George Pottie was settled by commissioners, and returned to the County court of Louisa, and ordered to be recorded. In this account, on the debtor side, there is an item as follows: "1822, Dec. 16. To amount of Isaac Winston's deed of trust, returned, \$5,000." And on the credit side there is the item, "1821, June 28. By Isaac Winston, for bank stock sold him, per deed of trust, \$5,000." At the time this account was ordered to be and was recorded, John Hunter was, and had been and continued to be until this suit was brought, clerk of the County court of Louisa; but the order directing the account to be recorded, and the record of the account, are proved to be in the handwriting of a deputy then in the office, who had since died.

In 1823 the administrator of Sandridge turned over to Nathaniel Thompson, guardian of George Pottie the younger, the estate of his ward which had been in the hands of Sandridge; and as a part of that estate he delivered to Thompson the bond of Winston. In 1824 Dickinson, one of the two sureties of Nathaniel Thompson, having, as it is stated on the record, suggested his fears of suffering in consequence of said securityship, Thompson waiving the necessity of a summons, an order was made requiring him to give

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other security ; whereupon he entered into another bond, with Garland Thompson, jun., Charles Thompson, Oswald McGehee and Henry Lawrence as his sureties.

On the 3d of November 1825 John Hunter married Isabella Pottie ; and they being on a visit to Nathaniel Thompson and his wife, the guardian and mother of Mrs. Hunter, on the 17th of November, Thompson informed Hunter that he was indebted as guardian to Mrs. Hunter about six thousand dollars ; that he held the bond of Winston for five thousand dollars, secured by a deed of trust ; that he had recently seen Winston, and that he promised payment of the debt in installments at short intervals ; and that as fast as Winston paid him he would pay Hunter in part discharge of what he owed as guardian of Hunter's wife. To this Hunter replied, that as Thompson intended to collect the debt to pay him, he had as well pass the debt to him, as he had no immediate use for the money, and preferred having it in safe hands bearing interest. This suggestion was adopted, and the bond was immediately transferred to Hunter ; who held it for near twenty years, receiving the interest regularly upon it, before he collected the principal from Winston.

The foregoing conversation and arrangement occupied between five and ten minutes ; and neither at that time, nor before nor afterwards, was Hunter informed by Thompson that he had received the bond from Sandridge's administrator, or that it was held by him as a part of the estate of his ward, George Pottie the younger ; nor does it appear from any evidence in the cause that Hunter was ever so informed until after the failure of Thompson in 1840. At the time of this transfer of the bond Thompson was in good credit, and in independent circumstances, able to pay up what he owed to Hunter's wife ; and the sureties in his bond as guardian were also in good circumstances ;

and his circumstances continued good until 1840, when, owing to the failure of speculations in which he had engaged, he became insolvent.

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In 1832 George Pottie the younger came of age; but he does not appear to have taken any steps to collect from his guardian, Nathaniel Thompson, the moneys of his in Thompson's hands until 1840, after Thompson's failure; and although the sureties in the guardian's bond lived in the neighborhood of Thompson, and were well acquainted with him, they do not appear to have made any attempt either to urge the payment by Thompson to Pottie or to obtain their release from their liabilities as Thompson's sureties. In 1840 Pottie brought a suit upon the official bond of his guardian, and obtained a judgment, a part of which was paid out of a trust fund conveyed by Thompson to indemnify his sureties and pay his creditors, and the balance was paid by the administrators of Lawrence and Garland Thompson, two of the sureties. These payments appear to have been made in 1842 and 1843.

In 1845 this suit was instituted by the administrator of Lawrence against Hunter, to obtain from him repayment of the amount he had been compelled to pay as the surety of Thompson as guardian of George Pottie; and subsequently the administrator of Garland Thompson came in by petition and was made a party plaintiff in the suit. The bill, after stating the death and will of George Pottie the elder, the qualification of Sandridge as the guardian of George Pottie the younger, the transfer to him by the executor of the bond of Winston, the qualification of Nathaniel Thompson as guardian of George Pottie, the transfer of the bond to him by the administrator of Sandridge, the settlement and recording of the guardian account, the marriage of Hunter with Isabella Pottie, and the giving in 1824 of the new bond as guardian of George

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Pottie, in which Lawrence became one of the sureties, as hereinbefore detailed, charged that about this period, Hunter having met with considerable difficulty in obtaining the money due to his wife from her guardian, Nathaniel Thompson, and being perfectly familiar with all the circumstances of the case, and knowing that the bond of Winston for five thousand dollars was the property of the ward, George Pottie, and not the property of Thompson, combining fraudulently with the said Thompson, obtained an assignment by Thompson to him of the said bond, and received the same as *pro tanto* a discharge of the debt due from Thompson to him, and had since held the said bond as his own property, and still held the same, unless he had changed the debt by receiving payment of the said bond. And it was charged expressly, that these facts were known directly to Hunter, because he was at that time, as he had been for years previous thereto, clerk of the County court of Louisa, in which these facts were matters of record, and much, if not all, the record in his own handwriting. And it was charged that the doubtful condition of Thompson was known to Hunter; that he had full knowledge of the misapplication of the funds to the prejudice of the ward, George Pottie, or the sureties of Thompson, and that he thus obtained payment of his claim out of money which he knew could not be so applied without defrauding an infant or a surety.

The bill further stated the death of Lawrence, the action by George Pottie on his guardian's bond, and the payments made by the sureties; and making Hunter a party defendant, and calling upon him to answer to all the allegations of the bill, and to discover whether he still had the bond of Winston, prayed that if he still had it he might be compelled to surrender it, and to pay the interest he had received upon it, or, if the bond had been paid, that he might be compelled

to pay the amount thereof to the sureties of Thompson as guardian of George Pottie, and for general relief.

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Hunter answered the bill, and denied explicitly every statement in the bill as to his knowledge that the bond had been transferred by the executor of George Pottie the elder to Sandridge, or by Sandridge's administrator to Nathaniel Thompson, or that Thompson held it as a part of the estate of George Pottie the younger, or in any other manner which would have rendered it improper for Thompson to transfer it, or himself to receive it, in part payment of his wife's fortune, until 1840, when Thompson unexpectedly failed. He denied that Thompson was in difficulties in 1824, when Dickinson asked for other security, or that that proceeding was prompted by a fear of Thompson's failure. He denied that he had found any difficulty in obtaining payment of his wife's fortune from Thompson, and gave the facts attending the transfer of the bond substantially as before stated. He denied that he derived from his position as clerk of the court any knowledge that the bond had been transferred by Sandridge's administrator to Thompson, or of its being in any way or in any respect the property of George Pottie. And he stated the fact that the order for recording the settlement and the record of it was in the handwriting of one of his deputies. He averred that he not only did not know or suspect anything which rendered it improper to receive the bond, but that he could have had no motive to unite with Thompson in a misapplication of the bond, because Thompson himself was very able to pay his wife's fortune, and the security in the guardian's bond was ample; and it could not be supposed that he would combine with his wife's mere step father to defraud her brother, without the slightest inducement of danger or profit to himself.

The court below, without deciding whether Hunter

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was liable to pay the amount he had received upon the bond, directed a commissioner of the court to take an account of what Hunter had received, and also an account of what the plaintiffs had paid as sureties of Nathaniel Thompson as guardian of George Pottie. This report was returned, showing that Hunter had received nine thousand eight hundred and twenty-six dollars and fifty-seven cents; that Garland Thompson's administrator had paid one thousand seven hundred and eighty dollars and twenty-four cents; and Lawrence's administrator had paid one thousand eight hundred and twelve dollars and eighty-one cents. The first sum was received by Hunter prior to February 22d, 1842; and the payments were made by the representatives of Garland Thompson and Lawrence prior to September 2d, 1843.

The cause came on to be finally heard in April 1848, when the court made a decree by which Hunter was directed to pay to the plaintiffs, respectively, the sums reported by the commissioner to have been paid by them, with interest from the time the money was paid, and their costs. And from this decree Hunter applied to this court for an appeal, which was allowed.

Morson, for the appellant:

There is no case in the books in which a party has been charged with constructive fraud, where there was no earmark on the subject dealt for, upon the ground of some latent equity. In this case Hunter stands as the purchaser of this bond for full value, without notice of any equity in George Pottie. And on this question I refer particularly to the case of *Jones v. Powles*, 10 Cond. Eng. Ch. R. 310. That was a case of real estate, but this is personalty; and if we look to the law applicable to this species of property, we find as to bills of exchange the holder for value is not af-

fectured even by *crassa negligentia*, but that actual fraud is necessary. *Goodman v. Harvey*, 31 Eng. C. L. R. 212.

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We insist, then, that to subject a purchaser for value to a latent equity, there must be more than gross negligence; there must be fraud. This principle is directly applicable to the subject involved in this case; and in all the cases decided in this court the principle of the decisions is that there must be not only proof of a breach of trust by the trustee, but proof of notice of such breach by the party dealing with him. In other words, there must be fraud. *Dodson v. Simpson*, 2 Rand. 294; *Graff v. Castleman*, 5 Rand. 195; *Broadus v. Rosson*, 3 Leigh 12; *Fisher v. Bassett*, 9 Leigh 119; *Pinckard v. Woods*, 8 Gratt. 140. The first of these cases can only be sustained on the ground that the party dealing with the executor must have notice not only of the trust, but of its breach, before he can be held responsible; and in the other cases, all of them, the decision is founded on the principle that the party dealing with the trustee was conscious of his misconduct.

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In this case Mrs. Hunter was entitled to receive from the executor of her father more than the amount of this bond, and six thousand dollars was in fact paid by him to her guardian, and this guardian received in right of his wife, from the same executor, fifteen thousand dollars; and these sums were received in bonds. The presumption therefore is, as the fact is, that Hunter had no notice that this particular bond belonged to George Pottie; and that *omnis ritæ acta*. If then Hunter may *ex equo et bono* retain this money, the equities are equal; and the equities being equal *melior est conditio defendentis, aut possidentis*. But in fact the equities are not equal. The assignment of this bond to Hunter was in 1825; and then Thompson was in good circumstances, and so continued until 1840, without any notice to Hunter in all that time that

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he had been dealing with a trust subject, and without any effort on the part of Pottie to obtain from Thompson, his guardian, his estate.

Patton, for the appellees :

It would be very uncandid in me to attempt to show that there was actual fraud in Mr. Hunter, or even in Nathaniel Thompson, in this transaction. But in making the transfer of this bond Thompson was guilty of a gross breach of trust. It is true that this is not a suit by a ward against his guardian ; and it is also true that this attempt to subject Hunter has not been made until seventeen years after the transaction complained of, and seven years after George Pottie came of age. But it is also true that in a much stronger case against the relief sought, this court held the purchaser responsible, and that too at the suit of the sureties of the executor. *Pinckard v. Woods*, 8 Gratt. 140. In that case the delay was nearly as great. The executor was amply solvent at the time, and continued in good credit for years. He was, moreover, a legatee of one moiety of the estate, which owed no debts ; and the bonds sold were less than his interest in the estate. Here it was not a sale by the guardian to a *bona fide* purchaser for value ; nor was it a pledge for money advanced at the time : And not even Hardwicke and Mansfield can satisfy this court that there is no distinction between these cases and a transfer or pledge by the guardian for the payment of his own debt. Hardwicke refers to the only principle upon which a purchase of trust property can be countenanced in a court of equity : That is, that the trustee has the legal title and power of sale ; and a purchaser who deals with him in good faith is entitled to presume he is exercising his power in good faith. But when the trust property is not disposed of by a sale, as was the case in *Pinckard v. Woods*, but to discharge a debt of the trustee, the party dealing with

him takes upon himself the burden of showing that the trustee had a right so to deal with the property.

There could be no doubt in this case of Hunter's liability, if the bond showed upon its face that it belonged to George Pottie. There can be no doubt, after the decision of *Pinckard v. Woods*, that the guardian had no right to transfer a security which was safe, and leave only his own liability. But further. The fund was then put out just as the court would have directed if the guardian of Pottie had had the money in hand and had asked the directions of the court as to its investment. The court is referred to *Field v. Schieffelin*, 7 John. Ch. R. 150, for an able review of the authorities on this subject.

The only ground upon which Hunter can stand with any hope of success is, that the security had no earmark, and that he was a purchaser for value without notice. But in the nature of things there were circumstances which should have awakened suspicion; though I do not say that it did awaken the suspicion of Hunter. Nathaniel Thompson had been the guardian of Mrs. Hunter ever since the death of her father; and Hunter, as clerk of the County court of Louisa, was bound to know that Thompson ought to have invested her estate. When, then, Thompson told him he had a bond which he was about to collect for the purpose of paying him, he should have known that he had been misapplying her property, and should therefore have suspected that he was about to misapply George Pottie's. He knew that Sandridge's account as guardian of Pottie had been settled, and recorded in his office, though he had never examined the settlement; and therefore he might readily have ascertained to whom this bond belonged.

But further. To entitle himself to the defence of a purchaser for value without notice, he must have ac-

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quired the legal title. But neither the legal or equitable title to this bond was in Nathaniel Thompson. The legal title was in the executor of George Pottie the elder; and the equitable title was in George Pottie, junior. The bond was transferred, not assigned, by the executor to Sandridge, the first guardian of George Pottie, junior; and in the account of Sandridge he is charged and credited with the amount.

I do not mean to say that the guardian could not sell the property of his ward, even a bond, to pay debts, or that he could not collect choses in action. But I do mean to say he cannot transfer it to pay his own debt: And the only principle on which the sale is sustained in any of these cases is that the trustee has power to sell, and that the purchaser is not bound to enquire further. In this case the guardian had no greater power to dispose of the bond than the slaves of his ward. Could he have paid his debt to Hunter by transferring to him Pottie's slaves, which came into his possession in the same way that the bond came? Would not the slaves be still considered and held to be the slaves of Pottie? Suppose that, instead of transferring the slaves at a valuation, he had given a deed of trust upon them to secure Hunter's debt; would that have been valid?

I take it that a guardian has no legal title to the property of his ward; though he has the legal power to control, and, as to the personal property, to sell. But as I have before said, Thompson had neither the legal or equitable title to this bond. It, and the trust to secure it, were given for money loaned by John Thompson, as executor of George Pottie the elder, to Winston. Mr. Hunter was bound to know all these papers disclosed. They did not show any title in Nathaniel Thompson; but they showed that they were the property of the testator of his wards: And Hunter had no right to suppose that the bond came to

Thompson as his own property. He does not say in his answer that he supposed it came to Thompson in right of his wife: And if he had said so, what right had he to suppose it? I submit that when he saw that this bond and deed of trust had been a part of the estate of George Pottie the elder, and knew that others beside himself were interested in that estate, it was gross *laches* in him not to enquire how Nathaniel Thompson acquired it. Mr. Hunter excuses himself for this neglect by saying that Thompson was about to collect the money. But if he had collected it, he had no more right to pay the money than he had to transfer the bond: And he had no right to collect the bond, because it was then put out as it ought to have been. It was the money of George Pottie, received by Mr. Hunter without any authority to receive it, and an action for money had and received might have been maintained for it.

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The court is referred to American Leading Cases, p. 300, for a collection of the authorities as to agents, showing that the transfer by one partner improperly does not transfer the title; and to *Fisher v. Bassett*, 9 Leigh 119, in which the only objection was the sale of the bonds at a discount. Is that worse than to dispose of the whole subject to the trustee's own use?

Robinson, for the appellant, in reply:

Nathaniel Thompson was solvent in 1824, as is proved by his giving security as guardian, and by his deposition; and by the conduct of these parties in lying by for fifteen years after the transfer of the bond to Hunter: And he continued solvent until 1840. These parties, by signing the bond, give the best evidence of his solvency and trustworthiness. Hunter was married in 1825; and within a fortnight afterwards, being at the house of his wife's guardian and step father, this guardian, without any prompting, tells Hunter what

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he proposes to do to pay him his wife's fortune; and the arrangement for the transfer of this bond is made, as detailed in the evidence.

Then, what is the attitude of these plaintiffs? They say we vouch for Thompson's trustworthiness, and they bind themselves for his acts; and now they seek to subject a man for their relief, who they admit has been guilty of no fraud, of no breach of trust, and who never vouched in any way for the acts of Thompson. But it is said the circumstances should have excited his suspicions, and have prompted him to enquire into the true ownership of the bond. We say he did only what every gentleman would have done, even the most learned in the law either of this bar or bench. And the question is whether a man who thus acted is to be deprived of this subject as having been guilty of fraud: For that is the only ground on which he can be deprived of it.

It is said that Thompson was so in possession of this subject that he had neither the legal or equitable title to it. It is true that the executor of George Pottie the elder owned the bond at one time; but he had parted with it. A creditor of the testator could not have followed it in the purchaser's hands. *Whale v. Booth*, 26 Eng. C. L. R. 210. The executor had a right to transfer the bond, and did transfer it in a regular and proper manner. He could not be expected to assign it so as to bind himself; and he could not bind the estate. The delivery to Sandridge passed the property in the bond to him; and the delivery by his administrator passed it to Thompson. 1 Lomax on Ex'ors 276; *Ewing v. Ewing*, 2 Leigh 337. If the bond had gotten out of his possession, *detinue* or *trover* might have been maintained by Thompson for its recovery. It is true a transferee could not sue upon it in his own name. And so in England now neither an assignee or transferee could sue in his own name. But

a court of law recognizes his right, and will not permit that right to be defeated by the assignor. *Welch v. Mandeville*, 1 Wheat. R. 233; *Heath v. Hall*, 4 Taunt. R. 326; *Kimball v. Huntington*, 10 Wend. R. 675; *Wilson v. Coupland*, 7 Eng. C. L. R. 77.

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It is argued that this bond was appropriated as the property of the ward, George Pottie, and in that character went into the hands of Thompson. To the extent that the ward had a right to this bond, the guardian had absolute control over it. *Field v. Schieffelin*, 8 John. Ch. R. 150. The doctrine of this case was recognized by this court in the case of *The Bank of Va. v. Craig*, 6 Leigh 399. In this last case the subject was bank stock; and if the power of control and sale exists as to bank stock, it must exist as to state stock or debt; and if so as to state debts, it must equally exist as to the debts of individuals.

In this case there is no question that whatever passed by the transfer of the bond to Sandridge passed to Thompson by the transfer to him. He might have sued upon it in the name of the executor of George Pottie the elder, and could not have been hindered by that executor from prosecuting that suit and collecting the money. And as we have seen that the guardian has the right to dispose of the ward's estate for value, the assignee for value is entitled to the protection extended to a purchaser for value without notice; and *Jones v. Powles*, 10 Cond. Eng. Ch. R. 310, applies.

The facts in this case abundantly show that Hunter could have no reasonable ground of suspicion that Thompson was dealing improperly with a trust subject. And as in *The Bank of Va. v. Craig*, there was no *mala fides* and no motive of gain. He had Thompson and his sureties, who were of undoubted credit, bound to him. He might lose, but could not possibly gain. If he had not taken the bond he would have proceeded at once against them. But these plaintiffs

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having delayed to question the transfer of the bond to him for much more than ten years, the sureties are now protected by the statute of limitations.

As these plaintiffs insist upon the enforcement of the strict rules of law, they must be bound by it. In *Mead v. Ld. Orrery*, 3 Atk. R. 235, the lord chancellor said he did not know any instance where an assignment has been made by an executor for a valuable consideration, that it had been set aside unless some fraud appeared between the executor and assignee. And to this effect was *Ewer v. Corbet*, 2 P. Wms. 148. The plaintiffs must therefore prove the fraud. The bill is indeed sweeping in its charges. But they are all denied in the answer and disproved by the evidence.

It is said that this bond was in fact the property of George Pottie, junior. Be it so. But do they show collusion between Hunter and the guardian? That is disproved. Did he have either means of knowing or reason to suspect that it was the property of George Pottie, junior? The only fact from which this suspicion could have arisen is, that Thompson transferred this bond to pay his own debt. The argument is that Hunter must know what the bond and deed showed; and then he must know all that he might have known. This argument has been tried before, (*Williams v. Nicolson*, 17 Eng. Ch. R. 473,) and was repudiated by Lord Langdale. The bond shows that it was given to the executor of George Pottie the elder. The deed shows no more. And the proofs are that Thompson received in bonds from this executor fifteen thousand dollars in right of his wife, and six thousand dollars as guardian of Mrs. Hunter. It is said Hunter does not say he supposed the bond to have been taken as a part of his wife's fortune. He says he supposed it was Thompson's; and as he must have known that Thompson had received from the executor twenty-one thousand dollars in bonds, he might therefore

well believe, when he saw Thompson treating this bond as his own, that it was his own in fact.

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The whole question then is, whether the transfer of the bond by Thompson, in payment of a debt of his own, is of itself sufficient to subject Hunter, however innocent he may be of any participation or knowledge or suspicion of Thompson's breach of trust. On this question I refer the court to *Rayner v. Pearsal*, 3 John. Ch. R. 378; *Petrie v. Clark*, 11 Serg. & Rawle 377; *Nugent v. Gifford*, 1 Atk. R. 463; *Bedford v. Woodham*, 4 Ves. R. 40, in note. These cases show that the transfer of a bond in payment of a private debt of an executor or guardian is not fraud, unless it is shown affirmatively that the transferee knew it was a trust subject. And this doctrine has been recognized by this court in the case of *Dodson v. Simpson*, 2 Rand. 294. And the explanation of those cases in which such an assignment has been held invalid is that such assignment was only important when it showed a knowledge on the part of the assignee that the character in which the assignor held it did not authorize him to use it as he did. *Scott v. Tyler*, referred to in *McLeod v. Drummond*, 14 Ves. R. 353. In the cases in this court where such an assignment was held invalid there were circumstances which brought home knowledge to the assignee, or should have satisfied him that the trustee was dealing improperly with a trust subject; and in all of them he knew positively that the subject dealt with was a trust subject. Such were the cases of *Graff v. Castleman*, 5 Rand. 195; *Broadus v. Rosson*, 3 Leigh 12; *Fisher v. Bassett*, 9 Leigh 119; and *Pinckard v. Woods*, 8 Gratt. 140. In this last important particular these cases are broadly distinguishable from the case now before the court.

It is asked whether if Thompson, instead of transferring this bond, had transferred Pottie's slaves, or made a deed of trust upon them to secure his debt to

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Hunter, it would have been valid. Such a conveyance, from its nature, would convey the slaves of some person; if his own, it would be decisive to show he could not convey the slaves of his ward; if on the face of the deed he conveyed the slaves of Pottie, this would bring home knowledge to the grantee and would not be allowed. A guardian, believing it to be for the interest of his ward, sells his slaves. Under such a sale the purchaser for value takes the legal title, and will be protected. Then suppose Thompson had sold Pottie's slaves as his own to Hunter: Hunter would have taken the legal title; and if he bought them without knowledge that they were the slaves of Pottie, he would hold them against all claimants. It may be difficult to sell and buy such a subject without knowledge; and if there were circumstances which should have led the purchaser to suspect a misapplication of the ward's estate, of course the title would fail. But this is the only distinction between slaves and bonds.

Then here are two innocent parties, one of which must suffer; and the question is, which of them? We say the sureties. They undertake for the guardian and vouch for his trustworthiness. They are the security which the law has provided for the ward. The guardian having power to transfer the bond, and this having been done so as to pass the title, it then becomes a question of equity; and every man's moral sense will say that it is not unconscientious for Hunter to retain this money.

The principle of substitution cannot be extended further, in such cases as this, than where there has been fraud on the part of the purchaser. Sureties may be expected to exercise some supervision over the guardian, and may be relieved by applying for further security. But the assignee is without redress. At all events, there is nothing in this case to induce the court to extend the principle of the cases already decided; and

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the *laches* of the plaintiffs should forbid relief. *Portlock v. Gardner*, 23 Eng. Ch. R. 594; *McLeod v. Drummond*, 14 Ves. R. 353, 17 Id. 153; *Ray v. Ray*, Coop. Ch. R. 264. It is not material in this aspect of the case whether the lapse of time or the statute is pleaded or relied on in the answer. There are different rules on this subject in different classes of cases. In some it must be relied on; in others this is unnecessary; and these cases of implied trust belong to the latter class. It is argued that Pottie might have maintained an action for money had and received, if it had not been barred by the statute. If Pottie was barred by the statute, how can these sureties be substituted to his rights? If he is barred, they are barred. And if such an action could have been maintained, then that is conclusive against this bill.

SAMUELS, J. Nathaniel Thompson, as guardian, was in possession of Winston's bond, as part of the estate of George Pottie, his ward. Whatever interest the ward had therein was subject to the guardian's control; he might have received the money due thereon if voluntarily paid; he might have sued for it in a common law court in the name of John Thompson, executor of George Pottie, the obligee, but for his own use as guardian; and the nominal plaintiff would have had no power to prevent the prosecution of the suit, or to prevent the collection of the money for the use of the guardian; or he might have sold and transferred the bond. But in any exercise of his authority the guardian must, at his peril, have acted with proper discretion in reference to the ward's interests. It is for the benefit of the ward himself that the guardian should, if possible, be regarded as having the legal title to the ward's personal estate. That title may be essential to the protection of the property itself; the guardian is responsible for its safe keeping, and it

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would be unjust to deny him the means which may be the only effective means of discharging his duty. In *Garland v. Richeson*, 4 Rand. 206, it was held that an assignee of a bond acquired no legal title to the *debt*; and it follows *a fortiori* that a mere transferree acquires no legal title. Yet we have seen that the transferree may in a common law court recover the money; and that the supposed holder of the legal title cannot interfere to prevent such collection. It is obvious that John Thompson, the holder of the legal title, and the obligee in this bond, could not recover the money due if the holder sued for his own use, or the bond itself in *detinue*, or its value in *trover*. It is difficult to understand a legal title thus shorn of the rights usually conferred thereby. It is enough, however, for the purposes of this case, to decide that Nathaniel Thompson, the guardian, was invested with such title as was the subject of sale; whether legal or equitable; or partly legal and partly equitable; or equitable in form, but legal in effect.

The interest of the ward requires that his guardian should have the power to sell his personal estate. Under certain circumstances, readily conceived, an immediate expenditure of money might be indispensable to protect the estate against loss; the guardian might find that the best mode, or only mode, of raising the money was by a sale of bonds belonging to the ward's estate. Under such circumstances, a delay for collection might be injurious or even ruinous to the ward's fortune. It is no valid objection to allowing the guardian this power to say, it may be abused: Every power, however necessary, may be abused. The objection would apply to every case in which one party is entrusted with the property of another. This power is justified by the reason and fitness of things, and is moreover well sustained by authority.

In *Truss v. Old*, 6 Rand. 556, Judge Green, speak-

ing of guardians, says, "Their authority is coupled with a legal interest, and is not barely an office." "It is an interest like that of a trustee for the separate use of a married woman, an executor in trust, or an administrator of an estate of which there is no surplus after the payment of debts; all of whom have a legal without any beneficial interest." Judge Green expresses the further opinion that the guardian has power to sell his ward's personal estate.

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In *Bank of Virginia v. Craig*, 6 Leigh 399, 426, Judge Carr says, "The power and legal title of Fox (the guardian) to dispose of the stock (the ward's property) is proved by many cases." And in this opinion Judges Brockenbrough and Cabell concurred. In the same case (p. 428) Judge Tucker says, "It is conceded also, that, as a general rule, a guardian has power to dispose of the personal estate of his ward; and though personally responsible for so doing, the vendee to whom he sells is not responsible, if he has dealt fairly and justly, and without notice of any fraudulent intent."

In *Field v. Schieffelin*, 7 John. Ch. R. 150, Chancellor Kent considers the question of a guardian's power to sell his ward's personal estate; and comes to a like conclusion with our own courts.

Holding, then, on the general question, that the guardian in this case had the power to sell, the question recurs, did he exercise his power within the limits and for the purposes prescribed by law? The answer is plain, that he did not; he used his power for his own individual benefit, by appropriating the ward's property to pay his (the guardian's) own debt. This was a breach of trust, a fraud upon his ward. So far as the case of the appellees depends upon the conduct of Thompson, the guardian, it is fully made out.

A recovery, however, cannot be had against Hunter,

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without showing his liability. The mere fraud of the guardian is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties. In this case Hunter took the bond on Winston of Thompson, who concealed the right in which he held it, and passed it off as his own property. It was taken at par, in part payment of a debt, which was amply secured. Hunter was not induced, by any hope of profit or fear of loss, to take the transfer. His only purpose was to receive a debt justly due, by a mode of payment convenient to both parties. In the argument of the case here it was properly conceded by the appellees' counsel, that Hunter did not in fact know that Thompson's title was imperfect; but he contended that as the bond on its face was payable to John Thompson, executor of George Pottie, it showed that at one time other parties were interested, and might still be interested therein; that if Hunter had used proper caution he would have enquired further, and upon such enquiry would have ascertained the right in which Thompson held the bond; that he must be held liable as he would be if he had procured the information which he might and ought to have obtained. In reply, it may be said that the money due Hunter's wife, and which he was about to receive at the hands of her late guardian, was a legacy given by the will of George Pottie, of which John Thompson was the executor; that Nathaniel Thompson, the guardian, in right of his wife, a legatee in Pottie's will, had received fifteen thousand dollars of the executor on account of that legacy; that these two legacies had been paid wholly or in part by the transfer of paper belonging to Pottie's estate. Under these circumstances, when the guardian proposed to transfer as his own a bond payable to Pottie's executor, Hunter might well suppose he had full right to do so: any man of ordinary prudence

would have been satisfied that all was right. Hunter must therefore be acquitted of any constructive fraud, as well as of actual fraud.

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George Pottie, the ward, and Hunter, the purchaser for value without notice, are the victims of Thompson's fraud; and in settling the question of loss between them the court should proceed upon the general principles of equity. If the equities be equal, the court will not interfere; or if one party have the advantage at law, equity will not interfere to deprive him of that advantage, unless in favor of a party having superior equity. Trying the case by these tests, we must hold that Hunter's equity is equal to that of George Pottie; a purchaser for value, without notice of fraud in his vendor, stands upon as high ground in equity as any creditor or *cestui que trust*.

Again. Thompson's transfer to Hunter gave him the power at law to receive the money if paid by Winston, and to give him a valid discharge; or to sue for it in a common law court in the name of Thompson, the executor, for his own use, and to recover it, without the possibility of interference by the nominal plaintiff or any other party. Although Hunter may not have had the legal title to the debt, yet such were his rights and powers at law. In the exercise of his right he has received the money, and thereby acquitted Winston of all further liability therefor. To hold him responsible to George Pottie, we must deprive him of the advantage given by his legal power and right. To arrive at such a result, we must overturn all the decisions of the courts upon cases of the same or like kind.

In *Broadus v. Rosson*, 3 Leigh 12, the parties dealing with the guardian were fully aware of his breach of trust, and actively co-operated with him therein for their own benefit; and for that reason were held liable.

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In *Dodson v. Simpson*, 2 Rand. 294, the party dealing with an executor was apprised of his breach of trust, and aided him therein; and was therefore held accountable.

In *Fisher v. Bassett*, 9 Leigh 119, a party knowingly dealing with an administrator, who in breach of his trust was applying the assets of the estate to his own use, was held responsible.

In *Pinckard v. Woods*, 8 Gratt. 140, a party, for his own profit, knowingly dealing with an executor in such way as to enable the executor to commit a *devastavit*, was made liable.

In each of these cases, and in many if not all others of like kind, the party dealing with the fiduciary has been held responsible, because and only because of his co-operation in the fraud. In our case this ruling fact does not exist. I am therefore of opinion that George Pottie had no right to draw Hunter in question for his dealing with Thompson, the guardian.

If George Pottie had no right to recover of Hunter, the appellees, claiming to be substituted to his rights, can have no right to recover. If, however, the case were otherwise between Pottie and Hunter, still, under the circumstances of this case, the appellees should not be permitted to subject the appellant to any liability. The intestates of the appellees respectively bound themselves by bond as securities for Thompson as guardian; and in 1825, when this bond was in full force, their principal committed the breach of its condition which is complained of in this suit. At that time the securities might have guarded themselves against all loss by using a small degree of diligence. They owed it to themselves and to the ward to see that the guardian, who obtained possession of the ward's estate by means of their credit, faithfully performed his trust; they should at least have taken care, when the ward attained full age, that the guar-

dian fulfilled his duty. Instead of this, however, they allowed the guardian to retain the estate for fifteen years without question. At the end of that time, and eight years after the ward had become of full age, the guardian becoming insolvent, the securities are compelled to pay the amount of the ward's estate in the guardian's hands. From 1825, when the bond was transferred to Hunter, to 1840, Thompson was perfectly solvent, and could have paid his ward if required to do so; yet the securities, confiding in Thompson's integrity and resources for indemnity, permitted him to retain the money without question. The loss resulting from the misplaced confidence of the securities should be borne by their estates; they trusted first, and they trusted last. They are asking relief against a party who is at least as innocent as themselves, and whose conscience is in nowise touched by their claim. He should not be held liable.

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I am of opinion to reverse the decree and dismiss the bill, with costs of both courts to the appellant.

DANIEL and LEE, *Js.* concurred in the opinion of *Samuels, J.*

MONCURE, *J.* concurred in reversing the decree and dismissing the bill upon the last grounds stated in the opinion of *Samuels, J.*, without dissenting from the first grounds stated by him.

ALLEN, *J.* concurred on the last grounds stated by *Samuels, J.*

DECREE REVERSED AND BILL DISMISSED.

Richmond.

FRENCH v. BANKHEAD.

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May 17th.

1. By statute, the general assembly of Virginia agree to cede to the United States the soil and jurisdiction to the extent of two hundred and fifty acres at Old Point Comfort, for the purpose of fortification and other objects of national defence, and authorize the governor to convey the land by deed to the United States. The land is a peninsula bounded by Chesapeake bay, Hampton roads and Mill creek. The governor directs a survey of the land to enable him to convey, and directs the surveyor to lay off the two hundred and fifty acres as the United States shall elect to take it. The surveyor returns a plat and report, in which he says that the United States elected to take by high water mark, and he gives the courses and distances, commencing at a point at high water mark, and running nearly coincident with high water mark except where it runs from Mill creek to the bay, and in that course it stops on the bay at high water mark. The deed takes the description by course and distance from the report, but does not refer to it in terms. **HELD:**
 1. That in determining the boundaries of the land ceded to the United States, the act, the report and the deed are all to be looked to in order to ascertain what boundary was intended.
 2. Looking to the act, the report and the deed, the intention was to convey by the high water mark, and that is the boundary of the conveyance.
 3. That under the act, 1 Rev. Code of 1819, ch. 87, p. 341, the conveyance by the high water mark boundary passed to the United States the soil and jurisdiction to the low water mark.
2. The land at Old Point Comfort had been appropriated by legislative enactments to the public use; and it was not therefore subject to be appropriated by individuals as waste and unappropriated land, by entry and patent.

This was an action of ejectment in the Circuit court of Elizabeth City county, brought by James S. French against General James Bankhead, the officer of the United States in command at Fortress Monroe. The

facts are stated in the opinion of the court delivered by Judge *Allen*.

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It will be seen from the statement of facts that French's patent purports to commence at the south-east corner of Mill creek bridge, the beginning corner in the deed from the governor of the state of Virginia, conveying to the United States two hundred and fifty acres of land at Old Point Comfort; and it calls for the lines of the United States land from that point along Mill creek: And the great question in the cause was, whether the United States held by a water boundary, which gave them the land to low water mark, or whether their title was limited to the lines of their deed, which were intended to be and were substantially conformable to high water mark? Another question was, whether the land covered by the patent of French was waste and unappropriated land, subject to entry and survey?

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After all the evidence had been introduced, the plaintiff asked the court to instruct the jury:

1st. That if the jury shall be of opinion that the deed executed by David Campbell, the governor of Virginia, to the United States, was actually executed by him as the conveyance in writing which he was authorized by the act of March 1st, 1821, to make, of soil and jurisdiction to the United States, and was accepted and received by the United States as the conveyance in writing which was to be executed by the governor of Virginia to convey soil and jurisdiction under the said act of March 1st, 1821, then said deed is to be taken as the agreement of the commonwealth of Virginia and of the United States, of what should be the boundary of the territory so ceded; and in ascertaining what the boundaries are as so ceded, and in ascertaining what the boundaries are as made by the said deed, the jury are to construe the said deed by the words and terms to be found in the

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deed itself; and cannot vary, alter, or add to the words of the deed by any extrinsic evidence, or evidence without the deed itself.

2d. If in construing the deed and applying it to the land, the subject of the grant, by the descriptive calls of the deed, any ambiguity should arise, then the jury must be governed, in solving such ambiguity, by the descriptive calls used in the deed itself; but evidence derived from matters without the deed may be used to explain the terms or words used in the deed, and apply them to identify the land granted; but cannot be used to change the terms or words of the deed, or make an agreement for a boundary not called for in the descriptive words of the deed.

3d. That in law a distinction exists between a boundary by courses and distances and a high water mark. When courses and distances alone are called for in the deed, and high water mark is not called for therein, then as a matter of legal construction the deed is an agreement to make the boundary a boundary by courses and distances, and not by high water mark.

These instructions the court refused to give. There was a fourth instruction asked for by the plaintiff, which was given; and which it is not necessary to state.

The defendant asked for five instructions to the jury, the first of which the court refused to give: The other four were as follows:

2d. If the jury believe from the evidence that the agent of the United States, at the time of the survey in 1838, elected the line of high water as the boundary of the lands of the United States on the Chesapeake bay, Hampton roads and Mill creek, and that the lines run by the surveyor were designed to correspond generally with said high water line, and did so correspond generally, and that the courses and distances mentioned in the deed from the governor of

Virginia to the United States are the courses and distances of the lines so run, then the boundary of said lands is a water boundary, notwithstanding the courses and distances called for in said deed. And the water boundary so established extends, by virtue of the act of assembly then and still in force, to the ordinary low water mark; and consequently the plaintiff acquired no title by his patent to any lands described therein which lie above the ordinary low water mark.

3d. The lands covered by Mill creek at ordinary high tide were not patentable at the time the plaintiff obtained the patent under which he claims in this case; and the said patent therefore gave the plaintiff no title to such lands; and as to all such lands embraced by the said patent the jury should find for the defendant.

4th. The lands between high water mark and ordinary low water mark were not subject to entry at the time of the entry on which the plaintiff's patent is founded. And if the jury believe from the evidence that any part of the lands covered by the said patent lie between ordinary high water mark and ordinary low water mark, then as to such lands the plaintiff acquired no title by said patent, and the jury as to such lands should find for the defendant.

5th. The lands at the Old Point Comfort, extending to low water mark on the Chesapeake bay, Hampton roads and Mill creek, were not liable to entry as waste and unappropriated lands at the date of the entry on which the plaintiff's patent is founded. And if the jury believe from the evidence that the lands covered by the said patent, or any part thereof, are part of the lands known as Old Point Comfort, then the plaintiff acquired by his patent no title to such lands, or any part thereof, above the ordinary low water mark; and as to all such lands embraced by said patent the jury should find for the defendant.

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These instructions the court gave. And to the opinion of the court refusing to give the three first instructions asked for by him, and giving the four last instructions asked for by the defendant, the plaintiff excepted. There was a verdict and judgment for the defendant; whereupon French applied to this court for a *supersedeas*, which was allowed.

The case was most elaborately argued by *Baxter* and *Cox*, for the appellant, and *Joynes* and *Lyons*, for the appellee.

For the appellant, it was insisted :

1st. That the deed was the exponent of the agreement between the state of Virginia and the United States, and could alone be looked to, to ascertain what were the boundaries of the land thereby conveyed. As mediately or immediately bearing on this question, they referred to *The People v. Godfrey*, 17 John. R. 225; *United States v. Bevans*, 3 Wheat. R. 336; Broom's *Maxims* 266, 267, 50 Law Libr.; D'warris on Statutes 22, 9 Law Libr.; 1 Philips' *Evi.* 538, 548; *Miller v. Travers*, 21 Eng. C. L. R. 288; *McIver v. Walker*, 9 Cranch's R. 173; S. C. 4 Wheat. R. 444; *Chinoweth v. Haskell*, 3 Peters' R. 92; *Howard v. Ingensoll*, 13 How. S. C. R. 381; *Decatur v. Paulding*, 14 Peters' R. 497; *Foster v. Neilson*, 2 Peters' R. 253.

2d. That the deed not calling for a water boundary, but a boundary by courses and distances, the United States is not entitled to claim by a water boundary, though in fact the courses and distances called for in the deed are coincident with the high water mark. On this question they referred to Rutherford's *Inst.* 463-4-5; Schutz on *Aquatic Rights* 117, 122, 125, 24 Law Libr.; Hargrave's *Law Tracts* 12, 14, 15, 25, 26, 31, 32, 35, 36; *The King v. Ld. Yarborough*, 3

Barn. & Cress. 91, 10 Eng. C. L. R. 19; Livingston's Argument in the Battuer Case; *Houston v. Moore*, 5 Wheat. R. 49; *Commonwealth v. Clary*, 8 Mass. R. 72; *Harris v. Elliott*, 10 Peters' R. 25.

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3d. That if the deed was to be construed as conveying by the high water mark line, it did not operate to convey to low water mark. That whatever may be the general law of Virginia on the question, yet that the United States could only take, and did take, under a special act of the general assembly limiting the amount to be taken to two hundred and fifty acres; and that all the proceedings by the executive showed that it was only intended to convey this quantity of land; and that it was intended to limit the conveyance by the boundaries stated in the deed.

4th. That it was not competent for the United States, which showed neither title to, nor occupancy which could ripen into title by adversary possession of the lands in controversy, to question the validity of the appellant's title. Code of 1849, p. 428; *Warwick v. Norvell*, 1 Rob. R. 308; *Jackson v. Johnson*, 1 Bibb's R. 58; *Sutton v. Menser*, 6 B. Monr. R. 433; *Polk's lessee v. Wendell*, 9 Cranch's R. 87; S. C. 5 Wheat. R. 293; *Norvell v. Camm*, 6 Munf. 233.

That by the law of Virginia all waste and unappropriated lands are subject to entry and grant by patent. And that such are all lands which have not been patented. *Whittington v. Christian*, 2 Rand. 353, 369, 371; *McClung v. Hughes*, 5 Rand. 453, 478-9, 488; Code of 1849, ch. 112, § 37, 38; Sess. Acts of 1850-51, p. 33, ch. 41, § 10.

And they referred to the various acts passed by the legislature from the year 1679 to the present time, in relation to the lands at Old Point Comfort; and insisted that they were not excluded from the body of waste and unappropriated lands, which were subject to entry and grant.

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For the appellee, it was insisted :

1st. That the deed was not to be taken alone, to ascertain what was to pass to the United States; but that the act which authorized it, and the report of the surveyor which was made by the directions of the executive of Virginia, and upon which the deed was founded, were all necessary steps in conferring title upon the United States; and were to be looked to, to ascertain what passed by the deed. And they referred to *Handly v. Anthony*, 5 Wheat. R. 374; *Martin v. Waddell*, 16 Peters' R. 367, 411; *Howard v. Ingersoll*, 13 How. S. C. R. 381, 412; *Garner's Case*, 3 Gratt. 655, as showing that this was a contract between independent states, and to be construed upon principles of international law. To show the principles upon which the contract should be construed, they referred to Vattell, book 2, ch. 3, § 152; *Foster v. Neilson*, 2 Peters' R. 253; Vattell, book 2, ch. 17, § 244; *Wright v. Cartwright*, 1 Burr. R. 285; Noy's Maxims 48, 50; *Garner's Case*, 3 Gratt. 655.

2d. That the deed was intended to convey, and did convey, by a water boundary, which by the law of Virginia carried the grant to low water mark: And they referred to the facts to show this. On this point they cited *Handly v. Anthony*, 5 Wheat. R. 367, 374; *Howard v. Ingersoll*, 13 How. S. C. R. 381, Curtis' opinion; *Lesseur v. Price*, 12 How. S. C. R. 59; *Bruce v. Taylor*, 2 J. J. Marsh. R. 160; *Rix v. Johnson*, 5 New Hamp. R. 520; Angel on Water Courses, § 29, 30, 53; 3 Kent's Com. 427-8-9; *Starr v. Childs*, 20 Wend. R. 149; *Dunlap v. Stetson*, 4 Mason's R. 349; *Mayhew v. Norton*, 17 Pick. R. 357; *Reid v. Lankford*, 3 J. J. Marsh. R. 420; *Carroway v. Witherington*, Taylor's North Car. R. 273; *Newsom v. Pryor*, 7 Wheat. R. 7; 1 Rev. Code of 1819, ch. 87, p. 341.

3d. That the land embraced in the patent of the appellant, lying between high and low water mark,

was not subject to entry and patent as waste and unappropriated land. And they examined the various acts of assembly to show that the land between high and low water mark was not patentable; and that the land at Old Point Comfort was embraced in what are spoken of in the acts of assembly as public lands, as distinguished from waste and unappropriated lands. And they insisted that though it was true that a mere trespasser or intruder would not be allowed to question the validity of his adversary's title, yet that principle did not apply to a party in possession *bona fide* claiming title. And they referred to *Whittington v. Christian*, 2 Rand. 353; *Warwick v. Norvell*, 1 Rob. R. 308; *Tichanal v. Roe*, 2 Rob. R. 288; *Polk's lessee v. Wendell*, 9 Cranch's R. 87; *Miller v. Kerr*, 7 Wheat. R. 1; *Poole v. Fleegee*, 11 Peters' R. 185, 210; *New Orleans v. United States*, 10 Peters' R. 662, 717, 731.

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ALLEN, *P.* delivered the opinion of the court :

By the terms of the federal constitution, the United States are bound to protect each state against invasion, and no state is authorized to keep troops in time of peace without the consent of congress. The duty of providing for the common defence being thus imposed upon the United States, and the erection and maintenance of fortifications being necessary and proper to perform this duty, the constitution confers upon congress the power to exercise jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, &c., &c. Having thus in a great measure surrendered the power of providing for her own protection against invasion, and her coast being exposed to aggression, the state of Virginia was called upon to cede to the United States places proper for the erection of forts, so that the United States

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might do that for the people of the state which she could not do herself.

On the 1st of March 1821, Sess. Acts, p. 102, an act was passed, entitled "An act ceding to the United States the lands on Old Point Comfort, and the shoal called the Rip Raps." The preamble of the act recites, "That whereas it is shown to the present general assembly that the government of the United States is solicitous that certain lands at Old Point Comfort, and at the shoal called the Rip Raps, should be, with the right of property and entire jurisdiction thereon, vested in the said United States, for the purpose of fortification, and other objects of national defence." And it is then enacted, "That it shall be lawful and proper for the governor, by conveyance, to transfer, assign and make over unto the United States the right of property and title as well as all the jurisdiction which this commonwealth possesses over the lands and shoal at Old Point Comfort and the Rip Raps: provided the cession at Old Point Comfort shall not exceed two hundred and fifty acres, and the cession of the shoal at the Rip Raps shall not exceed fifteen acres: and provided also, that the cession shall not be construed or taken so as to prevent the officers of this state from executing any process, or discharging any other legal functions, within the jurisdiction or territory herein directed to be ceded, nor to prevent, abolish or restrain the right and privilege of fishery hitherto enjoyed and used by the citizens of this commonwealth within the limits aforesaid: and provided further, that nothing in the deed of conveyance required by the *first section* of this act shall authorize the discontinuance of the present road to the fort, or in any manner prevent the pilots from erecting such marks and beacons as may be deemed necessary": With a further provision, "that should the United States at any time abandon the said

lands and shoal, or appropriate them to any other purposes than those indicated in the preamble to the said act, that then and in that case the same shall revert to and revest in the commonwealth."

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The evidence in the record shows that surveys of part of the lands at Old Point Comfort had been made under the direction of the officers of the United States in 1816 or 1817, and in 1818. And the law, by the proviso preventing the discontinuance of the present road to the fort, seems to recognize the then existence of a fort, which must have been in possession of the United States. After the passage of the act the United States proceeded to erect an extensive fortification on the point, but no conveyance was made by the governor, nor, so far as the record discloses, any measures taken to designate the precise boundaries of the land embraced by the cession, until the year 1838.

On the 16th of May 1838 a communication from the acting secretary of war was addressed to the governor, requesting him to make a conveyance in the manner prescribed by the provisions of said act, and for the maximum quantity of land contemplated to be ceded; and referring the governor to Captain W. A. Eliason, the bearer of the communication, as being authorized by the department of war to mark out to the surveyors, or other persons acting for the commonwealth of Virginia, the boundaries which for purposes of defence should be given to said cession.

This officer, on the 22d of May 1838, addressed a letter to the governor, in which he remarked, that the limits of the ceded territory at Old Point Comfort should include all the neck of land on which Fort Monroe is situated, from the bridge to the main land, and extend as far in the northerly direction as the plat of two hundred and fifty acres will allow; that he could not say how far this would be, until he knew

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how the law requires the survey lines to be run ; that he believed the lines ought to include only the dry land at ordinary high water, and that the coterminus land from high to low water line pertained as a matter of course to the plotted land. He furthermore stated that the high tide limits could be readily defined ; that it would not do to leave the land between high and low water in debate ; it must attach to the land above tide ; and it is to be desired that it does so without increasing the number of acres in the plat.

These papers were referred to the attorney general of the state, by the governor, for his opinion and advice. That officer, after stating that it did not appear from the papers before him whether the commonwealth owned two hundred and fifty acres of land above high water, advised that all the commonwealth's lands should be laid off by metes and bounds ; that then the surveyor should lay off, under the direction of the United States or its officers, so much of the public land, not exceeding two hundred and fifty acres, at Old Point, as they may require. That this land should be laid off by metes and bounds, the courses as well and durably marked as they could be. That the officers of the United States should elect whether they would have the whole survey laid off above high water mark, or whether they would include in its boundaries the lands below high water mark. On the return of the survey a conveyance should be made by metes and bounds. That the grant to the United States must be limited by the metes and bounds laid off, and they could not take either property or jurisdiction over the adjacent lands below high water mark as pertinent to the plotted land.

On the 1st of June 1838 the governor, as appears from an extract from the executive journal, directed the surveyor of Elizabeth City county, under the direction of Captain Eliason, and in accordance with the

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opinion of the attorney general, to make surveys of the lands and shoals mentioned in the act of cession, and return a fair plat and certificate of surveys to the executive. A survey was accordingly made by the surveyor, and a report returned to the governor. In the report so returned, the surveyor informs the governor that, in pursuance of his directions, he applied to Captain Eliason to elect whether he would have the land ceded to the United States surveyed to high or low water mark; that he elected the former for the boundary, but requested the surveyor to spread the low water line, the mud flats and grass marsh on Mill creek, on the plat; which he had done. He further states that he began the survey at Old Point Comfort, at the southeast foot of the Mill creek bridge; and then pursued the ordinary high water mark on the Mill creek shore, until he came to the mouth of a small gut running up into the grass marsh. From thence he pursued a line between the high land and the marsh until he came to a piece of land taken up by Shelton. He then pursued this line, by a line of marked pines, to the Chesapeake bay shore, at the ordinary high water; and then pursued the high water mark along the bay shore to the beginning; including an area of two hundred and seventy-eight acres one rood and ten poles, including also two acres ceded to the United States for a light-house. He then laid off two hundred and fifty-two acres for the United States, including the two acres for the light-house. And the report then gives the metes and bounds of the two hundred and fifty-two acres. The plat returned with the report shows that the land at the place described was a peninsula, bounded on one side by the Chesapeake bay, on another by Hampton roads and Mill creek, having a water boundary all around the tract laid off for the United States, except upon four

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of the lines called for. Of these, three run parallel with and on the edge of the high land and grass marsh, which is principally covered at high water, leaving but one line of sixty poles in length, which divides the part so laid off from the adjacent land. The report gives the boundaries, describing the survey as commencing at the southeast foot of Mill creek bridge, the position of which is designated on the plat; thence with the meanders of the creek to the mouth of a small gut running into the marsh, overflowed by high tide in the creek. From this point three lines are called for; the first terminating at a dead pine on the line between the high land and the marsh; the second calls for a pine; the third calls merely for course and distance; and the plat returned shows that these three lines run between the high land and the marsh, on the edge of the marsh. From the termination of the last line on the edge of the marsh, the survey calls for a line of sixty poles to the bay shore at high water mark; and thence by various courses and distances to the beginning.

In the report the surveyor says he pursued the high water mark along the bay shore to the beginning; and the fact that he did so appears from the plat returned. The meanderings of Mill creek are by fourteen courses, with distances on each course, amounting to five hundred and forty-nine poles; the three lines along the edge of the marsh call for one hundred and six poles; the line across the neck of land, from the marsh to the bay shore at high water mark, is sixty poles in length; the meanderings of the bay and roads are by sixteen courses, with distances on each, amounting to 864.20 poles, making the whole distance around the two hundred and fifty-two acres one thousand five hundred and seventy-nine poles, of which one thousand five hundred and nineteen poles appear from

the report and plat to have been a water boundary. The artificial boundaries made or marked and called for are the bridge, the dead pine, and the pine.

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The natural objects named are the mouth of the small gut running into the marsh, and the bay shore at high water mark, at the termination of the line across the neck between the marsh and bay.

The deed made by the governor bears no date, but an extract from the executive journal, dated the 29th of November 1838, recites that the governor executed a deed of cession to the United States for the lands at Old Point Comfort and the shoal called the Rip Raps, pursuant to an act of the general assembly of March 1821; and the same was transmitted to Captain Eliason, of the United States corps of engineers, to be recorded in the court of Elizabeth City county. On the 12th of December 1838 the deed was admitted to record in the proper county. It recites the act of March 1st, 1821, with its various provisions, and conveys the land at Old Point and at the Rip Raps, subject to the provisions of the law. It describes the tract of two hundred and fifty acres at Old Point Comfort as adjacent to and in part surrounding a tract of two acres theretofore granted by the commonwealth to the United States, and blends both into one tract of two hundred and fifty-two acres, the boundaries of which are described as beginning at the southeast foot of Mill creek bridge; and then gives the courses and distances, and other objects called for, as the same are set forth in the report of the surveyor returned to the executive. The deed, in that portion of it describing the two hundred and fifty acres at Old Point Comfort, does not in so many words refer to the report of the surveyor, or plat returned by him. But in reference to the fifteen acres of shoal at the Rip Raps, including the site of Fort Calhoun, the deed contains this clause: "The boundaries of the said tract of fifteen acres to

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be ascertained by reference to a plat and description made by C. Hubbard, acting surveyor of Elizabeth City county, dated the 17th July 1838, hereto annexed, marked A."

Such is the title under which the defendant, an officer of the United States, relies to protect him and the United States in the possession of the property, to recover which this suit has been instituted.

The lessor of the plaintiff claims under a patent as for waste and unappropriated land, founded on a land office treasury warrant, and entered and surveyed under the laws of the state providing for the appropriation of the waste and unappropriated land of the state, and the grant thereof in private property to individuals; jurisdiction over the territory still remaining in the commonwealth.

The grant to the lessor of the plaintiff is dated the 28th of August 1851, and is for 264.72 acres, described as lying in Elizabeth City county, including the mud flats between low water mark on Mill creek, the Shelton patent and the tract of two hundred and fifty-two acres of land conveyed to the United States by the commonwealth of Virginia by deed, recorded in the clerk's office of Elizabeth City county on the 12th day of December 1838, beginning at the east foot of Mill creek bridge, and thence along the United States land to the mouth of a small gut running into the marsh, the boundary of the United States land and the Shelton patent.

The patent being long posterior in date to the act of cession and deed to the United States, and calling to be bounded by the lands of the United States, it becomes necessary to enquire into the extent of the grant to the United States. To ascertain this, it is important to determine whether the literal calls of the deed should alone be regarded as defining and designating the limits, by a fixed, unvarying, mathematical line, where nothing

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else is called for, or whether it is competent to look at the law, and the plat and report of the surveyor, made out in pursuance of the instructions of the governor, to enable him to execute a conveyance, to ascertain what was the land actually intended to be ceded and conveyed. There is no ambiguity apparent on the face of the deed. If any arises, it results from a comparison of the calls of the deed with the subject granted. By that comparison it appeared that the subject of the grant was a sandy peninsula, varying by the action and operation of the tides and winds. Most of the calls in the deed were for magnetic lines and distances not terminating upon any monuments or marked boundaries. A survey made out according to the mathematical lines and calls of the deed would, with the exception of three objects, the bridge and the two pines, represent no visible objects but the land and the water. The magnetic lines and courses would be found to pursue the general outline of high water mark; the high water line not being a right line from station to station, as it would follow the slight indentations in the shore, so that a right line from station to station would at some places cross the mouths of small inlets and vary above and below the precise high water line. If by such comparison of the calls with the subject granted a doubt should arise as to whether a fixed line or a water boundary was intended, a survey made by the direction of the grantor, and which was his guide in making the conveyance, would be proper evidence to explain the ambiguity thus produced. *Bowling v. Helm*, 1 Bibb's R. 88; Burton on Real Prop. 142.

In this case the deed of the governor refers to a plat and description made by C. Hubbard, acting surveyor of Elizabeth City county, dated the 17th of July 1838. The report of the surveyor in evidence in this cause bears date the 30th of July 1838. But it is obvious that the report was accompanied by a plat; for he

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speaks of having made the surveys directed, and of having spread the low water line and mud flats and grass marsh on the plat. The survey necessarily preceded the report, and accordingly, the certificate on the plat from the executive department shows that the survey was made on the 17th of July 1838. But the plat gives no courses and distances; they are found in the report, from which they were copied into the deed. There is no doubt, therefore, that the report as well as the plat were before the governor when he executed the conveyance, and were intended to be referred to in the deed; and whether actually referred to or not, yet, as they were made out by the officer selected by the governor to enable him to execute the grant, it would be evidence as against the grantor as to the subject intended to be granted.

But this was not a transaction between individuals, but between state and state; and is to be considered and construed with reference to the character of the parties, and the object each had in view.

The act of assembly contemplated a survey; for, as the cession was not to exceed two hundred and fifty acres, a survey was essential to ascertain the quantity of land, and to define the line of demarcation between the land ceded and the adjacent land, to show to what extent the jurisdiction ceded to the United States would reach. The title of the United States depends on the act of cession and all that was done by the proper officers to carry it into execution. Until the quantity and locality of the land was ascertained, the title was incomplete; and as congress can only exercise exclusive jurisdiction in such places within a state, when purchased by the consent of the legislature of the state, the deed of the governor would not of itself confer title and jurisdiction. The act, the survey made necessary by it, and the deed were all necessary to consummate the title; and all must be

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regarded, though occurring at different times, as parts of one entire compact, resulting in the transfer of a portion of the soil and jurisdiction of the state to the United States for specified purposes, and subject to certain reservations contained in the act of cession. If we look at the deed as applied to the subject of the grant, and explained by the plat and report, we see that the descriptive part commences at the water mark, on one side of the tract, calls for fourteen magnetic courses and measured distances to the mouth of an inlet running up into the grass marsh. A reference to the plat shows that the three next lines pursued the line between the high land and the marsh, the ground of which is stated on the face of the plat to be below the water at high tide, although the grass is generally above; so that all the lines from the beginning along Mill creek and the marsh correspond in general with the high water mark. The line across the neck commences at the edge of the marsh and terminates within the sixty poles called for, on the bay shore at high water mark; and from thence the lines run round by magnetic courses and distances to the beginning. The tract of two hundred and fifty acres is described as adjacent to and in part surrounding the tract of two acres heretofore granted by the commonwealth to the United States, and the boundaries comprehend and include the two hundred and fifty acres and the two acres in one tract of two hundred and fifty-two acres. The act of January 2d, 1798, ceded so much of the public lands at Old Point Comfort, not exceeding two acres, as should be sufficient to erect a light-house. The boundaries of these two acres do not appear; but from the position of the light-house, as indicated on the plat, it may be fairly presumed it was, or was supposed to be, in part a water boundary; and, therefore, the two hundred and fifty acres are described as adjacent to and in part sur-

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rounds said tract of two acres, evidently referring to the exterior or land boundary so surrounded by the two hundred and fifty acres, and indicating that by blending the two tracts into one by a common boundary, there would be a continuous water boundary round the whole to the beginning.

The surveyor in his report furthermore certifies to the executive that the agent of the United States elected the high water mark for his boundary; but requested him to spread the low water line and the mud flats and grass marsh on Mill creek on the plat; which he accordingly did. The plat on its face indicates, by black and dotted lines, both the high and low water line; and the surveyor certifies that he began at the southeast foot of the bridge, and then pursued the ordinary high water mark on the Mill creek shore to the mouth of the small gut running up into the grass marsh; and from thence he pursued the line between the high land and marsh to Shelton's land; from thence, by a line of marked pines, to Chesapeake bay shore at the ordinary high water mark; and then he pursued the high water mark along the bay shore to the beginning; including an area of two hundred and seventy-eight acres one rood and ten poles, including the two acres ceded for a light-house. He then laid off the two hundred and fifty-two acres for the United States, including the two acres: And the plat shows that this was done by running a line across the neck from the grass marsh to the bay shore, cutting off 26.16 acres from the whole area of two hundred and seventy-eight acres one rood and ten poles, between the line of the United States and the land of Shelton; but no other change was made in the plat in respect to the boundaries of the two hundred and fifty-two acres.

From these facts it appears that no monuments or marks were fixed to indicate the curves and indenta-

tions of the creek or bay, and from the character of the land in question it would have been difficult, if not impracticable, to have fixed a boundary at high or low water mark, as at the time of the cession or survey, which would point out at all future times the gradual and imperceptible encroachment of the waters at one place, and the gradual accretion of the land at another. The surveyor did not attempt to fix the boundaries by such artificial monuments. The running by the magnetic course and measured distance was essential to compute the quantity of land within the area. But the lines on Mill creek and the bay were open lines; and left open because the natural boundaries of the creek and bay, the waters of which he represented on the plat at high and low water mark, obviated the necessity of any artificial marks.

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In the case of *Starr v. Childs*, 20 Wend. R. 149, the deed called for a line to the Genesee river, and thence northwardly along the shore of said river to Buffalo street. The court held that there was no necessity for looking to extrinsic circumstances, for that the deed on its face invested the grantee with a fee simple to the bank of the river. The judge, in giving the opinion, remarks: "That the cases show, what it is difficult for the human mind to resist, that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes or trees of the line, stand at a slight distance from the river. The expression of an intent to run the line along the stream reaches a distinct natural monument which overcomes the others." So in the case of *McCulloch's lessee v. Aten*, 2 Ohio R. 425, it is said: "That the fact that the marked corner called for stands four rods from the water does not create any ambiguity in the terms, down the creek with the several meanders thereof. They import the water's edge at low water, which is a decided natural

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boundary, and must control a call for corner trees on the bank."

In the case under consideration, no embarrassment arises from a conflict between artificial monuments and the line of high water mark, for no such monuments are called for. In *Bruce v. Taylor*, 2 J. J. Marsh. R. 160, the grant called to begin on the Ohio river; thence by courses and distances, without any marked lines or corners, to the mouth of a creek emptying into the Ohio; thence by courses and distances, without any marked lines or corners, to a stake; and thence for courses and distances round to the beginning. The court held, that as three of the calls were on the river, as there were no intermediate marked lines and corners, and as the general description was "to lie on the Ohio river," "these facts alone would not leave room for any other legal construction of the patent than that the Ohio river with its sinuosities is one of the lines of its boundaries." In the same case they say that even if the lines and courses had been marked, and the patent had called for the river as a line of the boundary, this call would control the marked line: It being a universal rule that the actual boundary, whether natural or artificial, shall control repugnant course and distance. In that case, the original survey was exhibited, and showed the river as a boundary. "This, the court said, was decisive. The survey was the foundation of the patent: It is of record, and in that respect equal in dignity to the patent. It does not contradict, but only renders fixed and certain, some of the calls of the patent; and that it may be used to aid in supplying omissions, or in correcting mistakes in the patent."

All these remarks apply directly to the case under consideration. The lands at Old Point Comfort having been held as public lands, their position in relation to the surrounding waters was well understood by the

grantor. The law ceded the right of property and title as well as the jurisdiction "over the lands at Old Point Comfort." It contemplated a survey, as that was necessary to ascertain the quantity; and as a conveyance was to be made by the governor, such survey would be naturally returned to the executive department, as his guide in describing the subject to be conveyed. The deed conveys the land at Old Point Comfort; it calls to begin on the water at the southeast foot of Mill creek bridge, and then for certain magnetic courses and measured distances, to the mouth of a gut running up into the marsh; in all, fourteen calls without any artificial marks or corners or monuments. And on the other side it commences on the bay shore at high water mark, and thence calls for courses and distances sixteen lines, to the beginning; without a mark or corner on any of the lines. And in addition to this, the report of the surveyor sets forth that the officer of the United States elected the high water as his boundary; that he pursued the ordinary high water mark on the Mill creek shore; that he commenced at the ordinary high water mark on the Chesapeake bay shore, and pursued the high water mark along the bay shore to the beginning. And the plat returned exhibits the line of high water as the boundary of the land surveyed. All the circumstances which led the court to hold, in the case of *Bruce v. Taylor*, that the legal construction of the patent, that the Ohio river with its sinuosities was one of the lines of the boundary, stand out with prominence in this case. To the same effect is the case of *Rix v. Johnson*, 5 N. Hamp. R. 520; and *Angel on Water Courses*, § 29, 30, where the authorities are reviewed. See also *Mayhew v. Norton*, 17 Pick. R. 357.

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I think, that having regard to the law, the report and survey, and deed of the governor, the legal construction of the whole transaction was to make the

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boundary of the land ceded to and conveyed to the United States a boundary by the line of ordinary high water mark, except on the line extending from the margin of the grass marsh across the neck to the bay shore at high water mark.

The attorney general, when consulted by the executive, advised that the officers of the United States should elect whether they would have the whole survey laid off above high water, or whether they would include within its boundaries the lands below high water mark, and on the return of the survey the conveyance should be made by metes and bounds; being of opinion that the grant to the United States must be limited to the metes and bounds laid off, and that they could not take jurisdiction over the adjacent lands below high water mark, as pertinent to the plotted land. And the governor directed surveys to be made in accordance with this opinion. From whence it is inferred that by his deed the governor intended to convey, by a certain fixed, invariable line, which, though it coincided generally with the high water at the time it was surveyed, must at all times be run according to the magnetic courses and measured distances, without reference to its actual correspondence with the line of ordinary high water mark, or the gradual and imperceptible changes caused by the encroachments of the bay or the accretions to the soil. The attorney general was correct in saying that the grant to the United States must be limited by the metes and bounds laid off, if by laid off is meant the bounds called for. But he cannot be supposed to have meant that such bounds must be artificial, made by the hand of man. Artificial monuments are liable to destruction; and surveyors seldom agree as to a precise mathematical line. The variation of the magnetic needle, uneven surfaces, and other causes, render it difficult, if not impracticable, to arrive at perfect accuracy; and hence natural or arti-

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ficial boundaries always control the mere magnetic calls. We are not, therefore, to suppose that a great natural boundary, as a river, or the shore of the bay, could not be adopted in a grant by a state to the United States. Convenience would seem to point out the latter as the most proper boundaries between two governments, where jurisdiction as well as property is regulated by the limits between them. "In a case of doubt," say the Supreme court in *Handly's lessee v. Anthony*, 5 Wheat. R. 374, quoting Vattel, "every country lying upon a river is presumed to have no other limits but the river; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and where there is a doubt, that is always to be presumed which is most natural and proper." When, therefore, the officers of the United States elected the ordinary high water mark as the boundary, and the surveyor adopted it, and the deed conveyed to it, the land passes to the boundary so called for and adopted.

The attorney general and the agent of the United States differed as to the effect of such conveyance: The latter supposing it would give title and jurisdiction down to low water; the former, that title and jurisdiction would be fixed by the magnetic calls for courses and measured distances, no matter how the water line varied. And the question now is, what was the legal effect of the act done? And that is a matter for judicial decision. If it were a mere grant of property, the jurisdiction remaining in the state, the right of the grantee would extend to ordinary low water mark, under the express provisions of the act of assembly, 1 Rev. Code of 1819, ch. 87, p. 341; which declares that hereafter the limits or bounds of the several tracts of land lying on the Atlantic ocean, the Chesapeake bay and the rivers and creeks thereof, within this commonwealth, shall extend to ordinary low water mark; and the owners of said lands shall

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have, possess and enjoy exclusive rights and privileges to and along the shores thereof, down to ordinary low water mark. By the common law, the title of the proprietor extends to the ordinary high water mark. The shore, or that space alternately covered and left dry by the rise and fall of the tide, being the space between high and low water marks, was in the king for the use of the public. The law of Virginia, so far at least as relates to the soil, has, as appears by the act referred to, been altered; and the limits or boundaries of the land extend over and include the shore, by operation of law. This was the law in force when the cession of the land at Old Point Comfort was made, and the law being general, and speaking at every instant of time, it operated upon the grant to the United States, and extended the bounds down to ordinary low water mark; thereby annexing the right to the soil between ordinary high and low water mark as incident or appurtenant to the adjacent land.

The provisions of the act of 1819 have been incorporated in the Code, ch. 62, § 1, 2; and constituted the law when the patent of the plaintiff's lessor was issued. But it is insisted that as the act ceded jurisdiction as well as property and title, that sovereignty cannot be yielded or granted by implication; and therefore, whatever might be the rule in the case of a private individual, there could have been no intention on the part of the state to apply such a rule to a grant of this description.

The state, in granting, where nothing appears to the contrary, must be presumed to have granted with reference to the general law. If she had granted to an individual, the right of property would have extended to the low water mark. If the United States, with the consent of the legislature, had purchased from the individual, the whole proprietary right would have passed; and if jurisdiction had been yielded, it must have been coincident with the right of property.

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The whole right of property was transferred by the act of cession and the conveyance under it; and the jurisdiction followed. If an island had been the subject of the cession, the grant of soil and property would, as here, extend to low water mark, and jurisdiction would follow. This cession might be assimilated to a grant of an island; it was known to be a peninsula nearly surrounded with water. A line across the narrow neck and the surrounding waters, furnishing the best and most convenient boundary for property as well as jurisdiction; and there being nothing in the terms of the grant to limit the bounds as to property, all the incidents of such a property attach to it, including the right to the gradual accretions, which, being imperceptible in their progress, may, in the course of years, increase the area beyond the quantity originally conveyed.

The legal effect of the deed, therefore, was to transfer to the United States the land to low water mark, with all the incidents of property so situated, and jurisdiction coincident with it, unless it should appear that in executing the transfer the governor has transcended the power conferred upon him by the law under which he was acting.

In giving an interpretation to such an act, the character of the parties to it, the purposes of the cession, and the situation and nature of the thing granted must all be looked to, and such construction given as will, if possible, carry out, and not defeat the intention which led to the grant. The parties were two governments, both equally interested in the accomplishment of the object in view, the erection and maintenance of the proposed fortifications. The purpose of the parties in making and receiving the cession is set forth in the preamble of the act. It recites that it was shown to the general assembly that the government of the United States was solicitous that certain land at Old

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Point Comfort, and the shoal called the Rip Raps, should, with the right of property and entire jurisdiction thereon, be vested in the United States, for the purpose of fortification, and other objects of national defence. In proceeding to execute a grant having these objects in view, the grant must be interpreted as intending to pass with the subject all the means necessary to carry into effect the design of the parties to it, and to preserve and maintain the fortifications in a state of efficiency thereafter. The legislature must have contemplated such a cession as would give the government of the United States free access to and the command of either shore. To erect the fortifications, docks and wharves would be necessary; to render them efficient, a free communication between the two fortifications, and unimpeded command of the shore and channel between the forts, was essential. To maintain discipline in a large garrison, and a proper police for the preservation of health and the safety of the public property, jurisdiction thereon in the words of the preamble was required. All these objects would be defeated if the state had retained the right to the soil between high and low water mark, and to the alluvion that might be formed. She could not have intended to retain it for any purpose of her own. It was for her interest that the fortifications should be so erected as to accomplish the object intended, the protection of her own citizens from foreign invasion. Nor could she have contemplated a sale of it as private property, upon which houses might be erected, masking the guns of the fort, and a conflict of jurisdiction brought about subversive of the police and discipline of the fort and garrison. Such a construction would defeat the declared purpose of the law. The nature of the property was well known to the state. It had been dedicated to the purposes of defence in the early history of the colony, and had con-

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tinued as public property up to the time of the cession; a sandy peninsula projecting into the bay and connected with the main land by a narrow isthmus, the water furnishing a proper boundary and the most palpable and convenient line of demarcation between the two jurisdictions. These considerations necessarily imply that it was the intention of Virginia to cede, and of the United States to receive, so much of the land at Old Point Comfort, including all the land on the point from shore to shore, as would be comprised in an area containing the prescribed quantity of two hundred and fifty acres. This implication is supported by the language of the act: The governor is authorized to make over, by proper conveyance to the United States, the right of property and title, as well as all the jurisdiction the commonwealth possesses over the lands and shoal at Old Point Comfort and the Rip Raps; provided the cession at Old Point Comfort shall not exceed two hundred and fifty acres: Thus implying that the lands at Old Point Comfort meant all the lands from the point upwards, so far as the government of the United States should require, so as not to include more than the prescribed quantity in the area cut off from the adjacent lands. The provisoes that the cession should not prevent, abolish or restrain the right and privilege of fishery hitherto enjoyed and used by the citizens of this commonwealth within the limits aforesaid, or in any manner to prevent the pilots from erecting such marks and beacons as may be deemed necessary, show that it was not supposed any right in the soil in the part of the land at Old Point Comfort cut off from the adjacent land would be retained by the commonwealth. But contemplating a grant of property and jurisdiction to the water boundary, the rights and privileges theretofore enjoyed and used were to be preserved unimpaired.

In giving a construction to the legal effect of the

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conveyance, so as to carry both property and jurisdiction to ordinary low water mark, the intention of each party, the state in making and the United States in accepting the cession, is promoted; whilst any other construction would defeat the object of the parties and render the grant illusory. The legal construction of the effect of the conveyance, extending the bounds of the grant from the line of ordinary high to ordinary low water mark, conforms to the general law and carries into effect the intention of the parties to the cession. By these transactions the state has parted with property and jurisdiction, subject to the reservations and provisoes contained in the act of cession, within the limits of the grant to the United States, on the Chesapeake bay, Hampton roads and Mill creek, down to ordinary low water mark. As an incident to such grant, the alluvion formed by the imperceptible increase of the land belongs to the United States; and therefore, there remained nothing within the limits aforesaid which could be made the subject of grant by the commonwealth to another.

If, as it has been argued, the land was to be laid off all around its area by metes and bounds, by which was to be understood fixed, unvarying lines, ascertained by permanent monuments or mathematical calls, it would have been the same, whether the ordinary low water or the ordinary high water mark had been elected as the boundary by the agents of the United States. The lines corresponding with either at the time of election, would have been fixed and unvarying. It would have been difficult, if not impracticable, to have designated such a line by artificial monuments, if low water had been selected, as every tide would have submerged them; and mathematical lines, the most uncertain of boundaries, must have been relied on. The low water mark, on a sandy peninsula like this, will necessarily vary through the operation

of the winds and tides. As accretions, imperceptible in their progress, were formed, state jurisdiction would attach, varying as the alluvion increased, disappearing as it diminished. Even if there was more doubt as to the legal construction of the deed, the inconvenience of the construction contended for would be a strong objection to adopting it. In the language of the Supreme court in *Handly's lessee v. Anthony*, 5 Wheat. R. 374, "In questions which concern boundaries of states, (and here jurisdiction is involved,) when great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

Questions were raised at the trial, and have been argued here, as to the validity of the patent to the lessor of the plaintiff. It is insisted by the defendant that the lands at Old Point Comfort could not be entered, surveyed and patented as waste and unappropriated lands of the commonwealth; that the acts of the government had separated these lands from the mass of waste and unappropriated lands, and reserved them for the public use as a site for fortifications and defence; and that this is a matter which any defendant, sued by another claiming under a patent under the general law, may set up to defeat this action.

It seems that as early as 1629-30, 6 Charles 1st, an act was passed by the assembly for the "raising of a ffort at Poynt Comfort"; and certain persons named, "by full consent of the whole assembly, were chosen to view the place," "and agree for the building, raysing and finishing of the same." A fort seems to have been erected, and various regulations in regard to the fort are found in the 1st vol. of Hening's Statutes, p. 166, 175, 215, 218. In 1639 an act was passed

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levying taxes to pay the captain of the fort and ten guards, and to build a new fort at Point Comfort. In 1671 Governor Sir William Berkeley, in reply to enquiries submitted by the lords commissioners of foreign plantations, reported that there were five forts in the colony, two in James river, but that they had neither skill or ability to make or maintain them, &c. 2 Hen. Stat. 512.

It does not appear from anything in the Statutes at Large whether a fort was continued at the point during the residue of our colonial history or not. By the revolution the commonwealth succeeded to the rights and dominion of the crown. In May 1779 the act passed for establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands; subjecting such lands to entry under land office treasury warrants, providing for the making and return of surveys, and for the issuing of patents. But in addition to the waste and unappropriated lands thus made the subject of entry, survey and grant, in the mode prescribed, there were certain lands in the eastern part of the state which, by the acts of the agents of the crown or commonwealth, the proprietor of all the waste lands in the commonwealth, had been set apart and appropriated to public purposes. It does not appear that any specific grant or special act passed for such appropriation. They seem to have been dedicated to the public use by being so used and enjoyed. When referred to in the laws, they are designated as public lands, and a specific mode of disposition was prescribed. Thus the act of May 1784, 2 Rev. Code of 1819, p. 414, directed that all public lands and other public property in or near the city of Richmond, except so much thereof as should be set apart by the executive for the use of the government, should be sold by certain commissioners named in the act. By another act, passed May 1784, 2 Rev. Code

415, all the public lands in this commonwealth, except those thereafter mentioned, were directed to be sold by commissioners named in the act. By the 3d section, certain of those lands in and near Williamsburg and in James City were transferred to and vested in the president and professors of William and Mary University forever. By the 4th section, the commissioners were empowered to sell the lands commonly called Gosport, except such part as in their opinion may be necessary for the use of the public. In October 1784, 2 Rev. Code 419, another act passed in relation to the disposition of the public lands called and known by the name of Gosport, and authorizing the commissioners to convey to purchasers thereof an estate in fee simple. In October 1785, 2 Rev. Code 423, an act entitled "an act for the sale of certain public lands," was passed, by which it was enacted "that the public lands in the counties of York and Elizabeth City, except a point of land in the last mentioned county, called Point Comfort, should be vested in certain commissioners by name, who were empowered to sell and convey the same to purchasers."

All these acts were passed after the general land law of May 1779, throwing open the waste and unappropriated lands within the territory of this commonwealth to entry, survey and patent by all adventurers. Yet it is manifest that the legislature did not suppose that lands set apart for public purposes, or the public lands, were embraced under the designation of waste and unappropriated lands. Special acts were passed for the sale of these public lands by commissioners, and the title of the state passed, not by patent, but by a conveyance of the commissioners specially authorized to execute deeds. The act last mentioned shows that the point of land in Elizabeth City county, called Point Comfort, was so held, not as waste and unappropriated land, liable to entry under a land warrant, but as public land, the title to which had vested in the

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commonwealth for special purposes. By the act of January 2d 1798, 1 Rev. Code 1819, p. 48, the governor was authorized by deed to convey to the United States all interest in and right and title to, as well as all the jurisdiction which the commonwealth possessed over, so much of the *public* lands, not exceeding two acres, situate in Elizabeth City, at a place commonly called Point Comfort, as should be sufficient to erect a light-house. Here again the land is treated as *public* land belonging to the commonwealth, the title to which was to be transferred by deed. A proviso in this law continued to the citizens of the commonwealth the privilege they then enjoyed of hauling their seines on the shores of said land. And by the act of cession the commonwealth authorized the governor to transfer by deed her right and title as well as the jurisdiction she possessed over the lands and shoal at Old Point Comfort and the Rip Raps. As a general rule, all lands which had never before been patented are to be considered as waste and unappropriated, and are liable to location by any holder of a treasury warrant. But as the crown first and the commonwealth afterwards owned all the public domain, it was competent for either to set apart a portion thereof for specific purposes. The early proceedings of the colonial legislature show that this point of land was so set apart; and from the fact that no attempt appears to have been made to take it up as waste land until recently, it would seem that the public right was universally acknowledged. The laws passed since the act of May 1779 recognize the existence of such public lands, provide for a specific mode of disposition, treat this as a portion of such public lands, and reserve it from sale, and the acts of 1798 and 1821 treat it as the public property of the state, when about to cede portions of it to the United States.

These various acts amount to a complete appropriation to the public use of the lands at Old Point Com

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fort, held by the commonwealth, and excepted from the sale of other public lands by the act of 1785, and withdrew them from the mass of waste and unappropriated lands. They were not liable to entry, survey and patent as such; and the patent therefore passed no title whatever. The act of March 31st, 1851, Sess. Acts, p. 33, protecting the magazine at Westham and any stone quarry now worked by the state from grant, cannot be so construed as to subject all other lands owned by the state, and held for specific purposes, to location as waste and unappropriated: It may confer the immunity of public lands upon the property therein mentioned if it was waste and unappropriated before that act. On this ground the plaintiff showed no title; and it was competent for any person to rely upon this defence. It is not like the case of a contest between claimants to a portion of the waste and unappropriated land under conflicting claims. In such controversies private rights alone come under review; and we give no opinion as to the right of a defendant in ejectment to object to the validity of the plaintiff's patent in such a case. But where the right is vested in the commonwealth for the benefit of the public, as in the case of the public square in the city of Richmond, the navigable waters and the soil under them held by the commonwealth for the common use, and expressly exempted from grant by the Code, ch. 62, § 1, it would be unreasonable and oppressive if the individual could not protect himself from an action of trespass brought by the patentee, until the patent had been repealed or shown to be invalid in some proceeding having that object directly in view.

These observations upon the rights of the parties dispose of all the questions raised by the instructions moved for on either side, and given or refused at the trial.

The first instruction asked for, and refused, asserts
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the proposition that the deed alone can be regarded to ascertain the rights of the United States. It has been already shown that the title of the United States depends upon the law, the proceedings had in execution of it, and the deed. They were all necessary to complete the cession, and must be looked to in order to find out what was intended to be granted and was in fact granted to the United States: The instruction was therefore properly refused.

The second instruction is rather an abstraction than an instruction bearing on the case, and for this reason properly refused, as calculated to mislead the jury. The terms are obscure, but the first clause would seem to imply that where a latent ambiguity arises from a comparison of the calls of the deed with the subject of the grant, no evidence *aliunde* could be received to explain it. It is in such cases that evidence *aliunde* must be resorted to; and, as has been already remarked, the law, the survey, report and deed must all be regarded in arriving at the intention of the parties, and to ascertain the extent of the cession. That instruction was properly refused.

The third instruction is based upon a state of facts not existing. Courses and distances are not alone called for in the deed. The southeast foot of Mill creek bridge, the mouth of the small gut running into the marsh, the dead pine, the line between the high land and the marsh, the pine, the bay shore at high water mark, are all called for; for this reason the instruction was properly refused, as calculated to mislead, and also because it asks for a legal construction of the effect of the deed, which the law did not warrant.

Nor did the court err in any of the instructions given to the jury at the instance of the defendant. From what has been already said, it appears that the deed, construed with reference to the law and acts

done in execution of it, gave to the United States a boundary, by operation of law, to the ordinary low water mark; and consequently the lessor of the plaintiff could acquire no title by his patent to any lands described in the deed which lie above ordinary low water mark.

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The third instruction, in regard to the lands covered by the waters of Mill creek at ordinary high tide, is to be taken *secundum subjectam materiam*. So far as it comes in collision with the defendant's grant, the patent could give no title, and as the grant to the defendant, by extending to ordinary low water on Mill creek, embraced all that could be the subject of grant, the patent to the plaintiff's lessor could give no title to such lands.

The fourth instruction is similar, in the principle involved, to the third.

The fifth is equally free from objection, taking it *secundum subjectam materiam*, which was the lands in controversy as claimed by the defendant. These lands had been granted, and property and jurisdiction parted with. They were, therefore, no longer waste and unappropriated at the date of the entry on which the patent issued to plaintiff's lessor; and upon the further ground, which was probably the meaning of the court, that the lands at Old Point Comfort, extending to low water mark on the Chesapeake bay, Hampton roads and Mill creek, were public lands, and not liable to appropriation by entry, survey and grant, as part of the waste and unappropriated lands of the commonwealth.

We think there is no error in the judgment, and that it should be affirmed.

JUDGMENT AFFIRMED.

Richmond.**TAPSCOTT v. COBBS & als.**1854.
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1. A party in peaceable possession of land is entered upon and ousted by one not having title to, or authority to enter upon, the land. The party ousted may recover the premises in ejectment upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title, or authority to enter under the title.
2. Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment, upon the strength of his possession, against one who has entered upon the land without title, or authority to enter under the title outstanding in another.

This was an action of ejectment in the Circuit court of Buckingham county, brought in February 1846, by the lessee of Elizabeth A. Cobbs and others against William H. Tapscott. Upon the trial the defendant demurred to the evidence. It appears that Thomas Anderson died in 1800, having made a will, by which he appointed several persons his executors, of whom John Harris, Robert Rives and Nathaniel Anderson qualified as such. By his will his executors were authorized to sell his real estate.

At the time of Thomas Anderson's death the land in controversy had been surveyed for him, and in 1802 a patent was issued therefor to Harris, Rives and N. Anderson as executors. Some time between the years 1820 and 1825 the executors sold the land at public auction, when it was knocked off to Robert Rives; though it appears from a contract between Rives and Sarah Lewis, dated in September 1825, that the land had, prior to that date, been sold by the executors to

Mrs. Lewis for three hundred and sixty-seven dollars and fifty cents. This contract was for the sale by Mrs. Lewis to Rives of her dower interest in another tract of land, for which Rives was to pay to the executors of Thomas Anderson the sum of two hundred and seventeen dollars and fifty cents in part of her purchase. In a short time after her purchase she moved upon the land, built upon and improved it, and continued in possession until 1835, when she died. In 1825 the executor Harris was dead, and Nathaniel Anderson died in 1831, leaving Rives surviving him. And it appears that in an account settled by a commissioner in a suit by the devisees and legatees of Thomas Anderson against the executors of Robert Rives, there was an item, under date of the 28th of August 1826, charging Rives with the whole amount of the purchase money, in which it is said: "The whole not yet collected, but Robert Rives assumes the liability."

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There is no evidence that the heirs of Mrs. Lewis were in possession of the land after her death, except as it may be inferred from the fact that she had been living upon the land from the time of her purchase until her death, and that she died upon it.

The proof was that Cobbs took possession of the land about the year 1842, without, so far as appears, any pretence of title. He made an entry with the surveyor of the county in December 1844, with a view to obtain a patent for it.

The court gave a judgment upon the demurrer for the plaintiffs, and Tapscott thereupon applied to this court for a *supersedeas*, which was allowed.

G. N. Johnson, for the appellant.

Irving, for the appellees.

DANIEL, *J.* It is no doubt true, as a general rule, that the right of a plaintiff in ejectment to recover,

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rests on the strength of his own title, and is not established by the exhibition of defects in the title of the defendant, and that the defendant may maintain his defence by simply showing that the title is not in the plaintiff, but in some one else. And the rule is usually thus broadly stated by the authorities, without qualification. There are, however, exceptions to the rule as thus announced, as well established as the rule itself. As when the defendant has entered under the title of the plaintiff he cannot set up a title in a third person in contradiction to that under which he entered. Other instances might be cited in which it is equally as well settled that the defendant would be estopped from showing defects in the title of the plaintiff. In such cases, the plaintiff may, and often does recover, not by the exhibition of a title good in itself, but by showing that the relations between himself and the defendant are such that the latter cannot question it. The relation between the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery in a controversy with any other defendant in peaceable possession, it is yet all sufficient in a litigation with one who entered into the possession under it, or otherwise stands so related to it that the law will not allow him to plead its defects in his defence.

Whether the case of an intrusion by a stranger without title, on a peaceable possession, is not one to meet the exigencies of which the courts will recognize a still further qualification or explanation of the rule requiring the plaintiff to recover only on the strength of his own title, is a question which, I believe, has not as yet been decided by this court. And it is somewhat remarkable that there are but few cases to be found in the English reporters in which the precise question has been decided or considered by the courts.

The cases of *Read & Morpeth v. Erington*, *Croke*

Eliz. 321; *Bateman v. Allen*, Ibid. 437; and *Allen v. Rivington*, 2 Saund. R. 111, were each decided on special verdicts, in which the facts with respect to the title were stated. In each case it was shown that the plaintiff was in possession, and that the defendant entered without title or authority; and the court held that it was not necessary to decide upon the title of the plaintiff, and gave judgment for him. In the report of *Bateman v. Allen* it is said that Williams Sergeant moved, "that for as much as in all the verdict it is not found that the defendant had the *primer* possession, nor that he entered in the right or by the command of any who had title, but that he entered on the possession of the plaintiff without title, his entry is not lawful"; and so the court held.

And in *Read & Morpeth v. Erington* it was insisted that for a portion of the premises the judgment ought to be for the defendant, in as much as it appeared from the verdict that the title to such portion was outstanding in a third party; but the court said it did not matter, as it was shown that the plaintiff had entered, and the defendant had entered on him.

I have seen no case overruling these decisions. It is true that in *Haldane v. Harvey*, 4 Burr. R. 2484, the general doctrine is announced that the plaintiff must recover on the strength of his own title, and that the "possession gives the defendant a right against every man who cannot show a good title." But in that case the circumstances under which the defendant entered, and the nature of the claim by which he held, do not appear; and the case, therefore, cannot properly be regarded as declaring more than the general rule.

The same remark will apply to other cases that might be cited, in which the general rule is propounded in terms equally broad and comprehensive.

In 2 T. R. 749, we have nothing more than the syllabus of the case of *Crisp v. Barber*, in which it is said

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that a lease of a rectory-house, &c., by a rector, becomes void by 13th Eliz., ch. 20, by his nonresidence for eighty days, and that a stranger may take advantage of it. And that the lessee cannot maintain ejectment against a stranger who enters without any title whatever.

And in *Graham v. Peat*, 1 East's R. 244, in which, upon a like state of facts, arising under the same statute, the plaintiff brought trespass instead of ejectment, it was held that his possession was sufficient to maintain trespass against a wrong-doer, the chief justice, Lord Kenyon, remarking, that "if ejectment could not have been maintained, it was because that is a fictitious remedy founded upon title."

These two cases as reported may, perhaps, when taken in connection, be fairly regarded as holding that mere possession by the plaintiff will justify the action of trespass against an intruder, but is not sufficient to maintain ejectment. If so, they are in conflict with the earlier decisions before cited. It is to be observed, however, of the first of these cases, that we have no statement of the grounds on which it was decided; and of the last, that it does not directly present the question whether ejectment could or could not have been maintained. And I do not think it would be just to allow them to outweigh decisions in which the precise question was fairly presented, met and adjudicated: The more especially, as the doctrine of the earlier cases is reasserted by Lord Tenterden in the case of *Hughes v. Dyball*, 14 Eng. C. L. R. 481. In that case, proof that the plaintiff let the *locus in quo* to a tenant, who held peaceable possession for about a year, was held sufficient evidence of title to maintain ejectment against a party who came in the night and forcibly turned the tenant out of possession. In Archbold's *Nisi Prius*, vol. 2, p. 395, the case is cited with approbation, and the law stated in accordance with it. In this country

the cases are numerous, and to some extent conflicting, yet I think that the larger number will be found to be in accordance with the earlier English decisions. I have found no case in which the question seems to have been more fully examined or maturely considered than in *Sowden, &c. v. McMillan's heirs*, 4 Dana's R. 456. The views of the learned judge (Marshall) who delivered the opinion, in which the whole court concurred, are rested on the authority of several cases in Kentucky, previously decided, on a series of decisions made by the Supreme court of New York, and on the three British cases of *Bateman v. Allen*, *Allen v. Rivington*, and *Read & Morpeth v. Erington*, before mentioned. "These three cases (he says) establish unquestionably the right of the plaintiff to recover when it appears that he was in possession, and that the defendant entered upon and ousted his possession, without title or authority to enter; and prove that when the possession of the plaintiff and an entry upon it by the defendant are shown, the right of recovery cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title."

"It is a natural principle of justice, that he who is in possession has the right to maintain it, and if wrongfully expelled, to regain it by entry on the wrongdoer. When titles are acknowledged as separate and distinct from the possession, this right of maintaining and regaining the possession is, of course, subject to the exception that it cannot be exercised against the real owner, in competition with whose title it wholly fails. But surely it is not accordant with the principles of justice, that he who ousts a previous possession should be permitted to defend his wrongful possession against the claim of restitution merely by

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showing that a stranger, and not the previous possessor whom he has ousted, was entitled to the possession. The law protects a peaceable possession against all except him who has the actual right to the possession, and no other can rightfully disturb or intrude upon it. While the peaceable possession continues, it is protected against a claimant in the action of ejectment, by permitting the defendant to show that a third person and not the claimant has the right. But if the claimant, instead of resorting to his action, attempt to gain the possession by entering upon and ousting the existing peaceable possession, he does not thereby acquire a rightful or a peaceable possession. The law does not protect him against the prior possessor. Neither does it indulge any presumption in his favor, nor permit him to gain any advantage by his own wrongful act."

In *Adams v. Tiernan*, 5 Dana's R. 394, the same doctrine is held; it being there again announced that a peaceable possession, wrongfully divested, ought to be restored, and is sufficient to maintain the action; and that no mere outstanding superior right of entry in a stranger can be used availably as a shield by the trespasser in such action. It has also been repeatedly reaffirmed in later decisions of the Supreme court of New York; and may therefore be regarded as the well settled law of that state and of Kentucky.

To the same effect are the decisions in New Jersey, Connecticut, Vermont and Ohio. *Penton's lessee v. Sinickson*, 4 Halst. R. 149; *Law v. Wilson*, 2 Root's R. 102; *Ellithorp v. Dewing*, 1 Chipm. R. 141; *Warner v. Page*, 4 Verm. R. 294; *Ludlow's heirs v. McBride*, 3 Ohio R. 240; *Newnam's lessee v. The City of Cincinnati*, 18 Ohio R. 327. In the case of *Ellithorp v. Dewing*, 1 Chipm. R. 141, the rule is thus stated: "Actual seizin is sufficient to recover as well as to defend against a

stranger to the title. He who is first seized may recover or defend against any one except him who has a paramount title. If disseized by a stranger, he may maintain an action of ejectment against the disseizor, and in like manner the disseizor may maintain an action against all persons except his disseizee, or some one having a paramount title."

In Delaware, North Carolina, South Carolina, Indiana, and perhaps in other states of the Union, the opposite doctrine has been held.

In this state of the law, untrammelled as we are by any decisions of our own courts, I feel free to adopt that rule which seems to me best calculated to attain the ends of justice. The explanation of the law (as usually announced) given by Judge Marshall, in the portions of his opinion which I have cited, seems to me to be founded on just and correct reasoning; and I am disposed to follow those decisions which uphold a peaceable possession for the protection as well of a plaintiff as of a defendant in ejectment, rather than those which invite disorderly scrambles for the possession, and clothe a mere trespasser with the means of maintaining his wrong, by showing defects, however slight, in the title of him on whose peaceable possession he has intruded without shadow of authority or title.

The authorities in support of the maintenance of ejectment upon the force of a mere prior possession, however, hold it essential that the prior possession must have been removed by the entry or intrusion of the defendant; and that the entry under which the defendant holds the possession must have been a trespass upon the prior possession. *Sowden v. McMillan's heirs*, 4 Dana's R. 456. And it is also said that constructive possession is not sufficient to maintain trespass to real property; that actual possession is re-

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quired, and hence that where the injury is done to an heir or devisee by an abator, before he has entered, he cannot maintain trespass until his re-entry. 2 Tucker's Comm. 191. An apparent difficulty, therefore, in the way of a recovery by the plaintiffs, arises from the absence of *positive* proof of their possession at the time of the defendant's entry. It is to be observed, however, that there is no proof to the contrary. Mrs. Lewis died in possession of the premises, and there is no proof that they were vacant at the time of the defendant's entry. And in Gilbert's Tenures 37, (in note,) it is stated, as the law, that as the heir has the right to the hereditaments descending, the law presumes that he has the possession also. The presumption may indeed, like all other presumptions, be rebutted; but if the possession be not shown to be in another, the law concludes it to be in the heir.

The presumption is but a fair and reasonable one, and does, I think, arise here; and as the only evidence tending to show that the defendant sets up any pretence of right to the land is the certificate of the surveyor of Buckingham, of an entry by the defendant, for the same, in his office, in December 1844, and his possession of the land must, according to the evidence, have commenced at least as early as some time in the year 1842, it seems to me that he must be regarded as standing in the attitude of a mere intruder on the possession of the plaintiffs.

Whether we might not in this case presume the whole of the purchase money to be paid, and regard the plaintiffs as having a perfect equitable title to the premises, and in that view as entitled to recover by force of such title; or whether we might not resort to the still further presumption in their favor, of a conveyance of the legal title, are questions which I have not thought it necessary to consider; the view which

I have already taken of the case being sufficient, in my opinion, to justify us in affirming the judgment.

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ALLEN, MONCURE and SAMUELS, *Js.* concurred in the opinion of *Daniel, J.*

LEE, *J.* dissented.

JUDGMENT AFFIRMED.

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LEE'S *ex'or* v. BOAK.1854.
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1. Where an issue is directed in a chancery cause, and a verdict is found, to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court as the established facts of the case.
2. Testator gives a legacy to a nephew, but directs that he shall account for the amount of certain bonds and receipts of the nephew which the testator had paid off for him as his security. After making his will, testator, shortly before his death and in contemplation of that event, delivers to the nephew the bonds, &c., with the view of their becoming his absolute property in the event of the testator's death, and for the purpose of discharging the nephew from all accountability for the same as one of his legatees, in his settlement with the executor. **HELD:**
 1. The intention of the testator being that the nephew shall not account for the moneys paid by the testator for him, the gift of the bonds and receipts is not an advancement in satisfaction of the legacy to the nephew.
 2. A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or the donee: and in this case the donation was valid.

Samuel Lee, by his will, recorded in 1842, directed his estate to be sold by his executors, and the fund arising therefrom, after the payment of his debts, to be distributed among a large number of nephews and nieces; giving to four of them, of whom the appellee, William L. Boak, was one, each two shares thereof, subject, however, as to the share of the said Boak, to a deduction therefrom of all moneys theretofore paid by the testator for him as his security. In 1845 Boak filed his bill against Throckmorton, executor, and the other legatees of Lee, for an account and distribution of the estate, claiming to be entitled to two full shares thereof, without any deduction on account of money paid by the testator for him as his security; and aver-

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ring that the testator, a short time before his death, and in contemplation thereof, when in full possession of his faculties, delivered to the complainant, to be canceled and destroyed, all the bonds evidencing such payments; expressly placing this act of delivery and donation upon the ground that it would be harsh and unjust, considering the past relations between them, to charge the complainant with such payments in the distribution of the estate.

The executor filed his answer, in which he expressed the opinion, that at the time of the alleged delivery and donation, the testator was incapable of knowing the meaning and consequence of the important act of releasing the complainant from the whole of his large indebtedness, if he was to get, besides, his legacy under the will. The amount paid by the testator as security for Boak was upwards of six thousand dollars, and was greatly more than two full shares of the estate. Sundry depositions were taken and filed on both sides, as well in regard to the delivery of the bonds, &c., as in regard to the capacity of the testator to do such an act. A cross bill and answer were also filed. The cause was then heard; and the court, regarding the case as a proper one for the decision of a jury, directed two issues to be tried. The issues were accordingly tried; and the jury found, "that the testator, Samuel Lee deceased, shortly before his death, and in contemplation of that event, delivered to the complainant, William L. Boak, the bonds, receipts and other evidences of debt for moneys paid by him as the security of the said Boak, with the view of their becoming his absolute property in the event of the testator's death, and for the purpose of discharging the complainant from all accountability for the same, as one of the legatees of the estate, in his future settlement with the executor; and further, at the time of such delivery and donation, the said Samuel Lee was

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of sound and disposing mind and memory, and capable of understanding the full effect and consequence of such an act." No exception was taken to the verdict; and a decree was rendered for a settlement of the executorial account and distribution of the estate; recognizing the right of Boak to two shares of the estate. From that decree this appeal was taken by Throckmorton, the executor.

R. T. Daniel and Brooke, for the appellant.
Faulkner, for the appellee.

MONCURE, *J.*, after stating the case, proceeded :

The appellant has no cause to complain, and does not complain, of the decree of the court below directing the issues. No exception having been taken to the verdict, and the court having rendered a decree thereon, the facts found therein must be regarded as the established facts of the case. Whether the testator stood in *loco parentis*, in relation to his nephew Boak; and whether the legacy was a portion, and the donation of the bonds, receipts and other evidences of debt was of such a nature as that, standing by itself, it would have been considered an advancement in satisfaction of the legacy; are questions which need not be answered in this case. For assuming them to be answered in favor of the appellant, that is in the affirmative, I am still of opinion that, according to the facts found by the jury, the case is in favor of the appellee. If from the mere fact of the donation of the bonds, receipts, &c., an intention on the part of the testator to satisfy the legacy to Boak would have been presumed, certainly the presumption would have been repelled by proof of a contrary intention. This is admitted by the counsel for the appellant. The question is one of intention, on all the facts of the case. The verdict expressly finds a contrary intention

in this case. It finds not only the fact of the donation of the bonds, &c., but that they were given for the purpose of discharging Boak from all accountability for the same as one of the legatees in his future settlement with the executor. The will had directed that Boak should be charged with the bonds, &c., in the settlement of his legacy. The established purpose of the donation was to discharge him from all accountability for the bonds, &c., in such settlement. The necessary consequence is that he is entitled to the legacy without any deduction on account of the bonds, &c.: just as if the debt had been paid by Boak, instead of given up to him; or as if the testator had made a codicil, releasing the debt and saying it was not to be deducted in the settlement of the legacy. The testator, by giving the legacy subject to a deduction of the debt, did not deprive himself of the power of afterwards receiving the debt, or giving it to the debtor, by a donation *inter vivos* or *mortis causa*, or by a codicil: And if so received or given, the debt would be discharged, that part of the will directing a deduction of the debt from the legacy would be revoked, and the debtor would be entitled to the legacy without such deduction: Unless, indeed, the debt were given in satisfaction of the legacy; in which case the legacy itself would be revoked. I do not see how this matter can be made plainer by argument or by authority. And I do not think there can be any room for doubt as to the right of Boak to the legacy, without any deduction for the debt, if the donation of the debt was a valid donation. That question I will now proceed briefly to consider.

Whether the donation was valid or not depends upon whether there was a sufficient delivery of possession to perfect the gift. All gifts, except by will, must be attended by delivery of possession to make them valid. Until such delivery they are inchoate and revo-

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cable; indeed mere nullities. The donation in this case, as found by the jury, was a *donatio mortis causa*. But there is no difference in this respect between donations *mortis causa* and *inter vivos*. The same kind of delivery of possession which is necessary to make good the one is necessary to make good the other. 1 Roper on Legacies 19; *Ewing v. Ewing*, 2 Leigh 337, 341 and 344. The cases are conflicting in regard to the donation of a debt by the delivery of a bond, note, or other evidence of the debt. I deem it unnecessary to review them, as most or all of them may be seen by reference to 1 Roper on Legacies, by White, ch. 1: 1 Story's Eq. Ju. § 433, note 3; 2 Id. § 706, 793 a, and notes. The distinction taken by Lord Hardwicke in *Snellgrove v. Baily*, 3 Atk. R. 214, between a gift by delivery of a bond and a note, saying that the former would be good as a donation *mortis causa*, but not the latter, though since followed in England, has been repudiated in several of the United States; in which it has been held that bonds, bills of exchange, promissory notes, and other choses in action are all equally proper subjects of a valid donation as well *causa mortis* as *inter vivos*. 1 Roper on Legacies, p. 16, note 7; 4 Kent's Com. 447; *Wright v. Wright*, 1 Cow. R. 598; *Constant v. Schuyler*, 1 Page's R. 316; *Borneman v. Sidlinger*, 15 Maine R. 429; *Wells v. Tucker*, 3 Binn. R. 366. In some of the states, Massachusetts, and perhaps Connecticut, for example, the distinction taken by Lord Hardwicke seems to have been recognized. *Parish v. Stone*, 14 Pick. R. 198. In Virginia, bonds, bills, promissory notes, and all other writings obligatory, are assignable, and the assignee may sue in his own name. If they are transferred without a written assignment, the transferee may sue at his own cost, in the name of the party in whom is the legal title; and his right will be recognized and protected by the court against the release or other act of such party. His remedy is

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complete at law, and he has no occasion to ask the aid of a court of equity. The principle that a court of equity will not assist a volunteer to complete his title, which in England may defeat a voluntary transfer of a chose in action not negotiable, would seem to have no application in this state; but a bill, note, or other writing obligatory, is as proper a subject of a valid donation as a bond. *Elam v. Kean*, 4 Leigh 333, is the only adjudication in this state which seems to have a particular bearing on the subject. In that case A, having a bond in suit, told B he might have it, and gave him the attorney's receipt. The executor of A received the money, and B brought an action against him for money had and received. The action was sustained, though B had given no consideration for the bond; the delivery of the attorney's receipt being considered a sufficient delivery to complete the gift of the bond. Judge Carr recognized the distinction taken by Lord Hardwicke in *Ward v. Turner*, 2 Ves. sen. 431, between such a constructive or symbolical delivery as was sufficient to pass the right to a chattel sold, and put it at the risk of the vendee, and such a delivery as was necessary to consummate a gift. But he said, "There are many things of which actual manual tradition cannot be made, either from their nature or their situation at the time; it is not the intention of the law to take from the owner the power of giving these; it merely requires that he shall do what, under the circumstances, will, in reason, be considered equivalent to an actual delivery." He then refers to the case of *Jones v. Selby*, Prec. in Chan. 300, in which the delivery of the key of a trunk was held to be a sufficient delivery to make a valid gift of a tally of £500 contained in the trunk; and also to *Noble v. Smith*, 2 John. R. 52, in which Chief Justice Kent said, "The cases in which the delivery of a symbol has been held sufficient to perfect the gift are those in which it was considered

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equivalent to actual delivery ; as the key of a room, or of a ware-house, which was the true and effectual way of obtaining the use of the subject." Judge Carr considered the receipt as the representative of the bond, which, being in court, could not be delivered ; and that, as in the case of the key, the delivery of this receipt was the true and effectual way of obtaining the use of the subject. These remarks are very appropriate to the case under consideration, and the principle of *Elam v. Keen* is, I think, decisive of this case.

In the case of *Ewing v. Ewing*, 2 Leigh 333, a gift of a bond to the obligor was held to be invalid for want of delivery : If the bond had been delivered the gift would have been sustained. This is obvious from the opinions of Judges Carr and Green. The former said, " Here it is expressly proved that the bond never was delivered, nor any written transfer made." The latter said, " In the case before us neither the bond in question, nor the money due upon it, could be effectually given or forgiven, or released to the obligor, but by the obligee's canceling or destroying it with that avowed intention, or surrendering it to the obligor, or to some other for him, or by some instrument in writing to that effect." See also the case of *Dunbar's ex'ors v. Woodcock's ex'or*, 10 Leigh 628, decided by a special Court of appeals.

A donation of a debt to the debtor himself is entitled to at least as much favor as a donation of the debt to a third person ; and a delivery of the evidence of the debt is at least as valid a delivery of the debt itself in the former as in the latter case. The delivery of the evidence of the debt to a stranger donee merely enables him to obtain possession of the subject of the gift ; while such a delivery to a debtor donee *ipso facto* puts him in possession of the subject, or converts to his own use that possession, which he had hitherto held for the use of his creditor. Indeed, a donation of

a debt to the debtor himself has been more favored by courts of equity than a donation to a stranger. It is believed there has been no case in which a court of equity has enforced an imperfect gift to a stranger; while there have been various cases in which that court has enforced an imperfect gift of a debt to the debtor. Some of ~~theses~~ cases are cited and commented upon in 2 Story's Eq. Ju. § 705 a, 706 and 706 a; and "they proceed (says Story) upon the distinct ground that the transaction was one exclusively between the creditor and the debtor; and that, taking all the circumstances together, it was clearly the intention of the creditor to treat the debt as in equity forgiven and released to the debtor himself. But cases of this sort (he further says) are clearly distinguishable from purely voluntary imperfect gifts or assignments of debts or other property to third persons."

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ex'or
v.
Boak.

I think there was a valid donation of the debt in this case; and it follows that I am for affirming the decree.

The other judges concurred in the opinion of *Moncure, J.*

DECREE AFFIRMED.

Richmond.1554.
April
Term.RICHARDSON'S *adm'r v. PRINCE GEORGE justices.*POINDEXTER'S *adm'r v. SAME.*

May 22d.

1. A judgment is recovered in the name of BH and three others, justices of P. G. county, for the benefit of the marshal of the Superior court of chancery for the Williamsburg district. The defendant being dead, a *scire facias* issues to revive the judgment, which, after setting out the plaintiffs, and the recovery of the judgment for the benefit of the marshal, adds, which marshal was W. **HELD:** This is not a variance.
2. In this case the marshal being dead, the *scire facias* recites that it was awarded at the instance of M, his administrator. Though it might have been more regular for the *scire facias* to recite that it was awarded at the instance and on behalf of the plaintiffs on the record, yet, as it would have been good if the averment at whose instance it had issued had been wholly omitted, the recital was mere surplusage, and does not vitiate the *scire facias*.
3. Neither the *scire facias*, nor any other part of the record, showing what was the character of the obligation or other liability upon which the original judgment was rendered, and the defendant's plea not averring that it was such a statutory bond as required that there should be a relator in any action brought upon it, and that the relator should be the party having the legal right to sue, it must be regarded as a common law bond or liability, subject to be sued on in the names of the payees without a relator, or for the benefit of the holder or any party entitled to the benefit of it; and whether W was marshal or M was his administrator is a question in which defendant has no interest, and it cannot be raised by him by plea in bar to the plaintiffs' claim.
4. The *scire facias* stated that the judgment had been suspended by injunction. This was an unnecessary allegation, and may be treated as surplusage; and a plea that the judgment had not been suspended by injunction offered no bar to the *scire facias*.
5. The *scire facias* further stated that the injunction had been dissolved. A plea that the injunction had not been dissolved is bad, and an issue made up upon it is immaterial. Therefore, though the court admits improper evidence upon it, offered by the plaintiff, it is not cause for reversing the judgment.

6. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either the plaintiff or defendant; and the injunction operates upon the judgment on the *scire facias*, to restrain and prohibit the issue of execution thereon.

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Richard-
son's
adm'r
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Prince
George
Justices.

Poindex-
ter's
adm'r
v.
Same.

These two cases are precisely the same, except in the names of the defendants below, who are the appellants. The statement of one is therefore the statement of the other.

In April 1847 a *scire facias* was issued from the clerk's office of the Circuit court of the county of New Kent, which recited, that whereas Benjamin Harrison, Thomas Cock, Nathaniel Colly and William Baird, justices of Prince George county, who sue for the benefit and at the cost of the marshal of the Superior court of chancery for the Williamsburg district, which marshal was Charles L. Wingfield, at a Superior court of law begun and held for New Kent county on Monday the 4th of October 1830, by the judgment of said court recovered against Holt Richardson and John L. Poindexter, on a motion for a judgment and award of execution upon a bond given for the forthcoming and delivery of property on the day and at the place of sale, taken by virtue of the plaintiffs' execution sued out of said court against the goods and chattels of the defendant Richardson and one Thomas H. Terrell and John H. Christian, the sum of eight hundred and thirty-four dollars and forty-two cents, the penalty of said bond, and their costs by them in that behalf expended. But the said judgment was to be discharged by the payment of four hundred and sixteen dollars and twenty-one cents, with interest thereon, to be computed after the rate of six *per cent. per annum*, from the 6th day of September 1830 till paid, and the costs, one dollar and eighty-six cents. Whereof, &c. And whereas a certain Charles L. Wingfield was the said marshal, and since the rendition of the judgment

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aforesaid, the execution of which has been suspended by an injunction obtained by the said Holt Richardson, the said Charles L. Wingfield and the said defendants, Holt Richardson and John L. Poindexter, have all departed this life, the said Richardson having died intestate as it is said; and administration on the estate of the said Charles L. Wingfield has been in due form of law granted to P. P. Mayo; and administration of the said Holt Richardson has been in due form of law granted to Theophilus A. Lacy, as we have been informed. And now in behalf of the said P. P. Mayo, administrator as aforesaid of the said Charles L. Wingfield, it is said that although judgment be given as aforesaid, and the injunction granted staying the execution of said judgment has been dissolved, yet execution of the debt, interest and costs still remain to be made. Therefore, at the instance of the said P. P. Mayo, administrator of the said Charles L. Wingfield, we command you, that you make known to the said Theophilus A. Lacy, administrator of the said Holt Richardson, that he be at the clerk's office, &c., on the first Monday in August next, to show cause, if any he can, why the said P. P. Mayo, administrator of the said Charles L. Wingfield, ought not to have execution against him, the said Theophilus A. Lacy, administrator of Holt Richardson, of the debt, interest and costs aforesaid, according to the judgment aforesaid.

The *scire facias* having been returned executed, the defendant appeared and demurred to it, and moved to quash it; and also tendered five pleas: 1st. *Nul tiel record*. 2d. That P. P. Mayo was not the administrator of Wingfield. 3d. That the execution of the judgment in the *scire facias* mentioned was not suspended by injunction. 4th. That at the time of the rendition of said judgment Charles L. Wingfield was not the marshal of the Superior court of chancery for the Williamsburg district. 5th. That the injunction

in the *scire facias* mentioned, by which the said judgment was enjoined, had not been dissolved.

The court overruled the demurrer, and refused to quash the *scire facias*, and on the motion of the plaintiffs, excluded the second, third and fourth pleas tendered by the defendant, but admitted the first and fifth : And the defendant excepted. There was a general replication to the first plea, and issue ; and the plaintiffs replied to the fifth plea, that the said injunction had been dissolved, and this they were ready to verify by the record. And the defendant took issue on the replication.

On the trial of the issue joined on the first plea, the plaintiffs introduced the judgment and award of execution ; and the defendant objected to the introduction of this evidence, without the production also to the court of the forthcoming bond on which the judgment and award of execution were awarded ; also the execution on which the forthcoming bond was taken, and the whole record of the suit out of which these had their origin. But the court overruled the objection, and gave judgment on that issue for the plaintiffs.

Upon the trial of the issue on the replication to the fifth plea, the plaintiffs moved the court to try it without the intervention of a jury ; to which the defendant objected. But the court overruled the objection, and determined to try the issue without a jury. The plaintiffs then offered in evidence a part of a record of a chancery suit lately pending in the Circuit court of New Kent. This was the proceedings in a cause which had been commenced in the Chancery court of Williamsburg, but was afterwards transferred to the Circuit court of New Kent. The part of the record filed commenced with an amended and supplemental bill filed by Holt Richardson in a suit which he had instituted in that court, as administrator of John Forth, against William Spraggins and Polly his wife ; and the

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Polindex-
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April.
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Richard-
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adm'r
v.
Prince
George
Justices.

Polindex-
ter's
adm'r
v.
Same.

object of this supplemental bill was to enjoin proceedings upon a judgment recovered against him on a forthcoming bond in the Circuit court of New Kent. But the part of the record nowhere shows who were the plaintiffs, or what was the amount of the judgment. This injunction was granted, and was afterwards dissolved. Upon this evidence the court gave a judgment for the plaintiffs on this issue. And the defendant excepted to the opinion of the court overruling his objections to the evidence upon the issues upon the first and fifth pleas, and also to the opinion of the court overruling his objection to the trial of the last issue by the court without a jury: And applied to this court for a *supersedeas*, which was allowed.

Lyons, for the appellant.

Steger, for the appellees.

LEE, *J.* It is no doubt true that if a *scire facias* for the purpose of reviving a judgment be found to vary in a material matter from the judgment, in the description which it undertakes to give of it, advantage may be taken of it in the proper mode, and the variance will prove fatal. But waiving the question whether a proper mode of making such an objection could be by a general demurrer or motion to quash, I am of opinion that no such variance appears in the present case. It is true the judgment was in the names of four persons, described as justices of Prince George county, suing for the benefit of the marshal of the District court of chancery held at Williamsburg, without giving his name, while the *scire facias* avers that his name was Charles L. Wingfield. But this is no variance. It is intended to furnish an additional means of identification of the person for whose benefit the judgment had been rendered, and to show the right of the party at whose instance the present proceeding

was taken. It is an averment in nowise repugnant to, but strictly consistent with, all the terms of the judgment, while the names, sums, dates, and other elements of description which the judgment affords, are found accurately given in the *scire facias*. The objection that the *scire facias* recites it was awarded at the instance of P. P. Mayo, administrator of Charles L. Wingfield, instead of Benjamin Harrison and the other three parties who are the plaintiffs on the record, is one rather of form than of substance. It might have been more regular for the *scire facias* to recite that it was awarded at the instance and on behalf of the plaintiffs on the record, but as it would have been good if the averment at whose instance it had issued had been wholly omitted, I regard it as mere surplusage, and not serving to vitiate; and the rather because the requirement of the process is that the defendant shall show, if anything he can, why execution should not be awarded against him "according to the judgment aforesaid," thus contemplating conformity to the judgment in the manner of the process sought, while it recognizes the right of the party for whose benefit it was designed to be taken. I think the demurrer and motion to quash were properly overruled.

It does not appear from the *scire facias*, or in any other part of the record, what was the character of the obligation or other liability upon which the original judgment was rendered. It may have been a statutory bond, made payable to the plaintiffs in their official character, or, though payable to them in such character, it may not have been a statutory bond, though good as a common law obligation; or it may have been a bond or other contract, payable to the plaintiffs in their individual character, the words justices of Prince George county being added as "*designatio personarum*." Nor do the defendant's pleas, or any of them, allege that it was such a statutory bond as required that

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there should be a relator in any action brought upon it, and that the relator should be the party having the legal right to sue. In the absence of any such information as to the character of the obligation, and of any averment that it was of the nature above indicated, we must regard it as a common law bond or liability, subject to be sued on in the name of the payees, without any relator, or for the benefit of any party who may be the holder, or lawfully entitled to the benefit of it. Thus the questions whether Wingfield was marshal, and whether Mayo was his administrator, are questions between the latter and the plaintiffs on the record, with which the defendant has no concern, because the demand being treated as a common law and not a statutory liability, and the proceeding being to revive a judgment on such a liability in the name of the payees, a judgment upon this *scire facias*, for whose use soever, will be a complete bar in favor of the defendant to any future action. At most, if the defendant desired to call in question the right of Mayo to use the names of the original parties, and to prosecute the *scire facias* for his own benefit, the proper mode was to apply to the court for its summary interference by rule. *Howard v. Rawson*, 2 Leigh 733, and authorities cited in the opinion of Judge Summers. He could not make such matter the subject of a plea in bar to the plaintiffs' action. I think the pleas that Wingfield was not marshal, and that Mayo was not his administrator, tendered immaterial issues, and were properly rejected by the court.

The plea that the judgment had not been suspended by an injunction offered no bar to the *scire facias*. It but served to point to another matter which might be made the subject of a plea in bar, and which, if not successfully answered, would defeat the action. It is true the *scire facias* does allege that execution of the judgment had been suspended by an injunction; but

this allegation was unnecessary, and may be treated as surplusage; and a naked traverse of such a matter offers no sufficient defence to the action. If the defendant desired to set up the statute of limitations in his defence, it was his duty to plead it distinctly and directly: He could not be entitled to the benefit of it upon a collateral issue. If the plea were strictly true, and there never had been an injunction, it does not follow that the judgment could not be revived. And if the defendant had pleaded the statute of limitations, the plaintiffs might have replied some matter (other than the pendency of the injunction) which might serve to take the case out of its operation, but of the benefit of which, upon the issue tendered, they might be deprived. I think, therefore, this plea also was properly rejected by the court.

The fifth plea tendered by the defendant (that the injunction had not been dissolved) was received by the court, and an issue made up upon it. And if this could be regarded as a good plea, or the issue joined upon it as material, it might admit of question whether the court did not err in admitting the imperfect and incomplete record offered by the plaintiff in evidence, in support of the issue upon his part. For although, as has been decided by this court in the cases of *White v. Clay's ex'ors*, 7 Leigh 68, and *Wynn v. Harman*, 5 Gratt. 157, a decree or other extract from the record may be given in evidence without the production of the whole record, yet from the case of *Masters v. Varner's ex'ors*, 5 Gratt. 168, we learn that this is to be so understood where the decree or extract so offered itself satisfactorily establishes the fact it is offered to prove. And in this case the portion of the record offered by the plaintiffs was scarcely sufficient to identify the judgment, the injunction to which was thereby dissolved, as that upon which the *scire facias* in question had been sued out. But I do not regard

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the plea as a good bar, nor the issue joined upon it as material. I can perceive no good reason why a party plaintiff, whose judgment has been enjoined, may not be permitted, upon the death of the defendant pending the injunction, to revive it against his personal representative. Such a proceeding can be no breach of the injunction, the object of which is to restrain the party from enforcing the judgment by execution, and reaping its fruits, until the matters of equity alleged can be heard and considered. All that the court of chancery intends to restrain is execution. The plaintiff may proceed so far as to be able to take out execution the instant the injunction is dissolved. 1 Eden on Injunct. 97. Now, where the defendant dies after the injunction, unless the plaintiff can go on and revive against his representative, he will not be in a situation, upon the dissolution of the injunction, to issue his execution, but must then be delayed till he can sue out his *scire facias* and obtain the order of revival; and thus, by the supervening death of the defendant, he is placed in a worse condition than when the injunction was allowed; while, if he is allowed to go on and revive his judgment, notwithstanding the injunction, he is merely reinstating himself to the right which he then had of issuing his execution as soon as the injunction is dissolved. In fact, the right to sue out execution upon its dissolution is the very condition of an injunction to a judgment; and if the judgment creditor die pending the injunction, the court of chancery will in a summary way impose it as a condition on the complainant to consent to revive at law, under the penalty of having his injunction dissolved if he refuse. *Medley v. Pannill*, 1 Rob. R. 63. And there can be no conceivable difference in this respect whether the necessity for the revival is occasioned by the death of the judgment creditor or the judgment debtor. The inconvenience to be remedied

is precisely the same in both cases. And what the court of chancery would itself enforce in a summary way by a rule, it surely would not regard as a breach of the injunction when sought to be accomplished by the ordinary process of law. The judgment creditor must take care to stop with the order reviving his judgment. Thus far may he go, but no farther; and the judgment of the court upon the *scire facias* is to be regarded as in strict subordination to the injunction to the original judgment, of which it is the mere continuation.

I regard this as the reasonable and sound doctrine upon this subject; and I have seen no case which should be considered as disaffirming it. It is true Judge Baldwin, in delivering his opinion in the case of *Smith's adm'r v. Charlton's adm'r*, 7 Gratt. 425, 466, intimates that pending a writ of error or *injunction* or *cessat*, an action of debt or *scire facias* cannot be brought upon the judgment. He cites no authority for the proposition, and, so far as it respects the injunction, it is an intimation thrown out *arguendo* and by way of illustration. He probably did not advert to the distinction between the nature and effect of an injunction and that of a writ of error or *cessat*. At all events it was a point not at all material to the decision in that case, and the remark of the judge, as it respects the injunction, must be regarded as *obiter* merely. On the other hand, there are several cases to be found in the English chancery, from which the right to revive a judgment by *scire facias* upon the death of the judgment debtor pending an injunction may be fairly deduced. Thus, where there is an interlocutory judgment, as by default or upon demurrer, and an injunction is allowed, the plaintiff may, notwithstanding, go on and ascertain his damages. *Morrice v. Hankey*, 3 P. Wms. 146. So where the defendant at law had put in a frivolous plea, to which the plaintiff demur-

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Same.

red, and there was an injunction allowed, and pending the injunction, the plaintiff went on and obtained judgment, it was held by Lord Macclesfield that this was no breach of the injunction. *Sidney v. Hetherington*, 3 P. Wms. 147 n. So where there had been an award made under a reference which had been made a rule of court, and an injunction was allowed, it was held by Lord Roslyn that the party might go on at law, take his rule to show cause why an attachment should not go for performance of the award, and proceed to make his rule absolute, without being guilty of any breach of the injunction, provided he did not execute the attachment. *Franco v. Franco*, 2 Cox R. 420. And in a case where there was judgment against a defendant as executor *quando acciderint*, and an injunction was allowed, the plaintiff at law, pending the injunction, took out a *scire facias* to enquire after assets: This was held by Lord King to be no breach of the injunction, being only a continuation of the old action on the same record. *Morrice v. Hankey*, 3 P. Wms. 146. In all these cases the object of the party was simply to place himself in a condition to sue out execution as soon as the injunction should be dissolved: and such is the purpose for which a party may well be permitted to revive his judgment where the defendant has died pending the injunction.

It is objected that the judgment on the *scire facias*, awarding execution, is in favor of Mayo, administrator of Wingfield, when it should have been in favor of Harrison and the other plaintiffs on the record. It might have been more regular that it should have been in terms in favor of the latter, for the use and benefit of Mayo, administrator, &c.; but as the judgment is to be understood with reference to the *scire facias* on which it is founded, and as that goes for award of execution according to the original judgment, it may be regarded as in effect an award of

execution to be sued out in their names for the use of Mayo, administrator of Wingfield, according to the suggestions contained in the *scire facias*. The objection goes rather to form than to substance, and does not call for a more grave consideration.

I am of opinion to affirm the judgment.

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The case of *Poindexter's ex'or v. Wingfield's adm'r* is in all respects similar to the foregoing, being a proceeding to revive the judgment against the representative of the other defendant, Poindexter, who had also died after the injunction. The same defence was made and the questions arising in this case are precisely the same as those in the former.

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ter's
adm'r
v.
Same.

I am of opinion that this judgment also should be affirmed.

ALLEN, MONCURE and SAMUELS, *Js.* concurred in the opinion of LEE, *J.*

DANIEL, *J.* dissented. He thought the fifth plea of the pendency of the injunction a good plea; and that the proof admitted by the Circuit court. of its dissolution was not sufficient.

JUDGMENT AFFIRMED.

Richmond.

BOYLES' *adm'r* v. OVERBY.1854.
April
Term.

May 22d.

1. An action on the case for fraud in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or by means of a fraudulent concealment of the unsoundness of the slave, cannot be maintained against the personal representative of the vendor.
2. In such an action against the personal representative of the vendor, though there is a judgment in favor of the plaintiff, the error will not be cured by the statute of jeofails. 1 Rev. Code of 1819, ch. 128, § 103, p. 511.
3. In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant, notwithstanding the verdict.
4. An action is misconceived, in the sense of the statute, only in a case wherein, upon the trial, the proofs show a cause of action fit to be asserted in a form different from that adopted. The defendant is held liable upon proof showing a liability; and if no objection is made to the form of the action until after verdict, the defect is cured thereby.
5. To hold a defendant liable upon a cause of action not asserted, is going to the utmost verge of the law, even where such cause of action is proved; but to hold him liable for such cause when not proved, or proved by evidence not admissible if the suit had been brought for that cause, is going beyond the letter and spirit of the law.
6. The statute, though it will aid defects, whether of form or substance, in pleading, where a portion of the matter pleaded is appropriate, does not apply to cases in which the matter pleaded is, in all its parts, merely nugatory, setting forth no cause of action or no ground of defence.

This was an action on the case in the Circuit court of Patrick county, brought by Allen S. Overby against the administrator of William Boyles deceased. The declaration contained two counts. The first set out that the plaintiff bargained with Boyles in his life time, to buy of Boyles a negro girl slave, and that Boyles, by falsely warranting and representing the said negro

to be sound, falsely and fraudulently induced the plaintiff to buy, and that he did buy of the said Boyles the said negro for, &c. ; whereas the said negro, at the time of said warranty and sale, was not sound, &c. The second count set out that the plaintiff was induced by Boyles to buy the said slave, by falsely, deceitfully and fraudulently suppressing and concealing from the plaintiff the fact that the slave at the time of the sale labored under an incurable disease called consumption, which said unsoundness was well known to said Boyles.

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adm'r
v.
Overby.

Whilst the case was pending the administrator of Boyles was removed from his office, and administration *de bonis non* was granted to Clark Penn; and on his motion, he was admitted a party defendant.

On the trial of the cause there was a verdict for the plaintiff for two hundred and eighty-six dollars and fifty cents, upon which the court rendered a personal judgment against Penn: And he thereupon applied to this court for a *supersedeas*, which was awarded.

Grattan, for the appellant.

There was no counsel for the appellee.

SAMUELS, *J.* The plaintiff's cause of action is set forth in a declaration of two counts.

In the first count he alleges a deceit by Boyles, the intestate, in the sale of a diseased slave; and alleges that the plaintiff was induced to purchase by means of a false and fraudulent warranty of soundness.

In the second count he alleges a deceit in the sale of an unsound slave by Boyles, the intestate, by means of a fraudulent concealment of the unsoundness of the slave. There is nothing in the record to show upon what proof the verdict was rendered.

These causes of action, and each of them, died with the vendor Boyles; if suit thereon had been brought

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in his life time, it must have abated by his death. The suit brought against his administrator, and revived against the administrator *de bonis non*, was for causes of action no longer in existence. This appears from the plaintiff's own showing; and judgment should have been rendered for the defendant, notwithstanding the verdict, unless the statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 511, may require a different judgment.

It is obvious to remark, that notwithstanding the comprehensive terms of the statute, it was not thereby intended to cure all cases occurring before verdict: If such had been the purpose of the legislature, a simple and direct enactment to that end would have been the mode adopted. Instead of this, an enumeration is given of particular errors, which, after verdict, shall not be relied on to stay or reverse the judgment; amongst them are these: "Any mistake or misconception of the form of action"; or "any other defect whatsoever in the declaration or pleading, whether of form or substance, which might have been taken advantage of by demurrer, and which shall not have been so taken advantage of."

In the enquiry whether either of these clauses of the statute includes the case before us, we may discard the second count of the declaration; that is clearly beyond the reach of help from the statute. The first count, in alleging the fraud, sets forth that it was perpetrated by means of a false warranty; and it has been suggested that this action on the case in form *ex delicto*, for the *tort*, the fraud in the deceit, was misconceived for an action on the warranty, and therefore is cured by the verdict. This I conceive cannot be so. The legislature cannot have intended to sustain a judgment because, in a different form of action, and upon proof of other facts, a judgment might have been had for damages assessed by a different rule; and

thus, almost necessarily, different in amount. The verdict in this case was rendered upon proof of fraud; for without such proof it could not have been rendered at all. See *Trice v. Cockran*, 8 Gratt. 442. Yet in an action on the warranty, fraud cannot be proven, being wholly immaterial to the cause of action. *The ex'ors of Evertson v. Miles*, 6 John. R. 138. In an action on a warranty of soundness, the measure of damages is the difference between the real value and the price paid. Tuck. Com., book 2, ch. 25, p. 353 of new edition; *Thornton v. Thompson*, 4 Gratt. 121. In case for deceit there is, perhaps, no fixed rule for the assessment of damages; they are not limited, however, as in an action on the warranty; if so, they may go beyond those recoverable in an action on the warranty. *Rice v. White*, 4 Leigh 474; *Brown v. Shields*, 6 Leigh 440. An action is misconceived only in a case wherein, upon trial, the proof shows a cause of action fit to be asserted in a form different from that adopted; the defendant is held liable upon proof showing a liability; if no objection be made to the form of action until after verdict, the defect is cured thereby. To hold the defendant liable upon a cause of action not asserted, is going to the utmost verge of the statute, even where such cause of action is proven; but to hold him liable for such cause when not proven, or proven by evidence not admissible if the suit had been brought for that cause, is going beyond the letter and spirit of the law.

The other clause of the statute of jeofails, above referred to, will not sustain the judgment. This clause was intended to aid defects of form or substance in pleading: If, however, a declaration sets forth no cause of action whatever, or a plea sets forth no defence whatever, the statute can give no aid. It extends to cases in which a portion of the matter pleaded is

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appropriate, but not to cases in which the matter pleaded, in all its parts, is merely nugatory.

The plaintiff having shown no cause of action whatever, I am of opinion to reverse the judgment; and on the authority of *Brown v. Shields*, 6 Leigh 440; *Mason v. Farmers Bank at Petersburg*, 12 Leigh 84; *Ross v. Milne & wife*, 12 Leigh 204; *Tompkins v. The Branch Bank*, 11 Leigh 372, to enter judgment for the defendant, notwithstanding the verdict.

MONCURE, J. Case and *assumpsit* are concurrent remedies for a breach of a warranty contained in a simple contract of sale. Formerly case was the remedy, generally, if not always pursued. Recently, it has been found more convenient to declare in *assumpsit*, for the sake of adding the money counts. In *Williamson v. Allison*, 2 East's R. 450, Lord Ellenborough, C. J., said: "The more modern practice had not prevailed generally above forty years. No other proof was required to sustain the former mode of declaring than the warranty itself and the breach of it." The *scienter* was not necessary to be averred; nor, if averred, to be proved. The action, though in form *ex delicto*, was in substance *ex contractu*. It could probably have been maintained at common law against an executor on the warranty of his testator, although the general issue is "not guilty," and the general rule, as laid down by Lord Mansfield in *Hambly v. Trott*, Cowp. 371, was, that an action in which "not guilty" was the general issue was a personal action, which died with the person. Being formerly the general, if not the only, form of action in such cases, it was probably used as well against executors as others. In *Powel v. Layton*, 5 Bos. & Pul. 370, Mansfield, C. J., seemed to be of opinion that case would lie against the executor of a carrier, the foundation of the action being essentially contract. The same principle would apply,

at least as strongly, to an action on the case for a breach of warranty.

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But, however this may be, I think the action might have been maintained under the equity of the statute, 1 Rev. Code of 1819, p. 390, § 64, which declared that "actions of trespass may be maintained by or against executors or administrators for any goods taken or carried away in the life time of the testator or intestate." This section is an extension of the statute, 4 Edw. 3, ch. 7, *de bonis asportatis*, so as to embrace actions brought *against* as well as *by* executors and administrators. *Vaughan's adm'r v. Winckler's ex'or*, 4 Munf. 136; *Lee v. Cooke's ex'or*, Gilm. 331. The statute of Edw. 3 altered the rule, *actio personalis moritur cum persona*, only in its relation to personal property, and in favor of the personal representative of the party injured. But to that extent it has always received a very liberal construction. "It has been observed that the taking of goods and chattels was put in the statute merely as an instance, and not as a restriction to such injuries only; and that the term trespass must, with reference to the language of the times when the statute was passed, signify any wrong; and accordingly the statute has been construed to extend to every description of injury to personal property by which it has been rendered less beneficial to the executor, whatever the form of action may be; so that an executor may support trespass or trover, case for a false return to final process, and case or debt for an escape, &c., on final process"; "or debt against an executor suggesting a *devastavit* in the life time of the plaintiff's testator, or case against the sheriff for removing goods taken in execution, without paying the testator a year's rent." 1 Chit. Pl. 69. Our statute being, as before stated, but an extension of the stat. of Edw. 3, should be construed in the same manner; extending to defendants the same rule of construction which, under

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the limited terms of that statute, had been applied only to plaintiffs. That such has been the case is shown by the decisions already cited and others to be found in our reports.

But even if I be wrong in all this, and if, instead of an action on the case, the plaintiff should have brought an action of *assumpsit* against the administrator of Boyles in this case, yet, the defendant not having demurred to the declaration, but having pleaded the general issue, and verdict and judgment having been rendered thereon, I think the defect was cured by the statute of jeofails, 1 Rev. Code, p. 512, § 103 ; being, at most, but a mistake or misconception of the form of action, which is expressly embraced in that statute. The only difficulty I have had on the subject has arisen from the fact that the declaration contained two counts, one for a false warranty and the other for a deceit. The latter, of course, cannot be supported against an administrator ; and if it had been the only count in the declaration, the defect would not have been cured by the verdict. But as the plaintiff, by proving the breach of a warranty by simple contract of the defendant's intestate, would have shown a good cause of action under the first count, though not in that form ; and as the defendant could by motion have had the plaintiff's evidence confined to that count, or an instruction to the jury to disregard the other count ; and as every reasonable presumption should be made in favor of the verdict, I think the verdict must be regarded as having been rendered on the first count, and the defect is therefore cured.

If the form of the action were the only objection to the judgment, I would, therefore, be for affirming it. But it was erroneously rendered against the appellant *de bonis propriis* ; and it would be necessary on that ground to reverse it, and render a judgment of the goods of the intestate.

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I have not considered the objection taken to the judgment on account of the exclusion of portions of the depositions, deeming it unnecessary to do so, as the case is decided by a majority of this court on other grounds.

LEE, *J.* also dissented from the opinion of *Samuels, J.*, though he was of opinion that the personal judgment against the administrator was erroneous, and on that ground it should be reversed.

DANIEL, *J.* concurred in the opinion of *Samuels, J.*, except as to the measure of damages on a warranty of soundness.

ALLEN, *J.* concurred with *Samuels, J.*

JUDGMENT REVERSED, *and entered for the appellant.*

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Term.FITZHUGH'S *ex'ors* v. FITZHUGH.

May 24th.

1. Money lent by a bachelor uncle to his nephew, to secure which a deed of trust upon slaves was executed, was held under the circumstances to have been forgiven and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust at the suit of the executors of the uncle.
2. Upon an issue directed out of chancery, the verdict of the jury is conclusive, where there is no exception spreading the facts proved upon the record.

This was a suit in the Circuit court of Fauquier county, instituted in 1844 by the executors of Thomas Fitzhugh against Dudley Fitzhugh, to enforce a deed of trust executed by the latter in September 1823, to secure two debts, amounting to eleven hundred and fifty dollars, due to Thomas Fitzhugh. The bill sets out the deed and alleges that no part of the debt had been paid. It alleges that one of the executors of Thomas Fitzhugh is the trustee in the deed and interested in his estate, and therefore cannot sell under the deed; and that the plaintiffs do not know what number of slaves embraced in it are still in the possession of the defendant. They therefore ask for a discovery of the slaves in the possession of the defendant; that they may be sold and the proceeds applied to the payment of the debt; that there may be a personal decree against the defendant for any residue of the debt, and for general relief.

Dudley Fitzhugh answered the bill. He admits the execution of the deed of trust, but denies that the whole or any part of the sums of money mentioned therein was due to Thomas Fitzhugh at his death.

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He states that when the said sums of money were obtained by him, Thomas Fitzhugh had no intention of exacting their payment. That the sum of seven hundred and fifty dollars was obtained on the 10th of March 1819, the sum of four hundred dollars on the 20th of August 1823, and no note or memorandum in writing was executed, or required to be executed, as a testimonial of the debts; and it was not until the 22d of September 1823 that the defendant, finding his pecuniary condition embarrassed, volunteered, without the knowledge of Thomas Fitzhugh, to execute and put upon record the said deed. He avers that Thomas Fitzhugh never in fact accepted the deed, nor regarded the same as a valid security for the repayment of the sums of money aforesaid. That the deed embraced all the slaves owned by the defendant; and some time after its execution the pressure of the defendant's pecuniary difficulties compelled him to raise large sums of money, which he effected by sales of certain of these slaves: and he names eight slaves that he had sold, and the prices, amounting to three thousand two hundred and ten dollars. All of which sales were made, as he alleges, with the privity and knowledge of Thomas Fitzhugh. That the purchaser required that Thomas Fitzhugh should be applied to and advised of the intended sales; and on every occasion he disclaimed any right or interest in the deed of trust or the property therein mentioned. That in this way repeated sales of the said property were made, until there only remained an old man, an old woman and a small girl, whose aggregate value does not exceed four hundred and fifty dollars. That defendant verily believes that when the said sums of money were advanced Thomas Fitzhugh had no intention of exacting their repayment, but intended the same as gifts. But however this may be, that after the said sums of money were advanced and the deed of trust exe-

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cuted, the defendant rendered to said Thomas Fitzhugh, through a series of years, valuable services, which were regarded and accepted by him as full satisfaction for said sums of money, or furnished a motive for the donation thereof; so that in any view, at his death no debt existed against the defendant on account thereof. That Thomas Fitzhugh was possessed of a very large estate, was unmarried and without children, was one of a very numerous family, lived to an advanced age, and many of his heirs and distributees were scattered in distant states and personally unknown to him; that his property consisted chiefly of lands and slaves, divided into four distinct establishments, upon neither of which did he employ an overseer. The defendant was his nephew, lived within a short distance of his residence, enjoyed his confidence and affection, and for many years before his death, when he had become incapable of active exertion, was in the daily practice of rendering assistance in the management of his affairs. Had an account been kept of these services, at a moderate value, they would have greatly exceeded the demand now sought to be established against the defendant; and if it shall become necessary for his protection, he prays that an account of his said services may be taken, and the value thereof set off against the demand of the plaintiffs.

The deed of trust referred to in the bill and answer bears date the 22d day of September 1823, and recites that the grantor, Dudley Fitzhugh, is indebted to Thomas Fitzhugh in the sum of one thousand one hundred dollars, with interest on seven hundred and fifty dollars, a part thereof, from the 10th day of August 1819, and with interest on four hundred dollars, the residue thereof, from the 20th of August 1823. It provided for the execution of the trust at any time after the 1st of January 1824, if the money

was not paid by that time : and it was executed by the grantor, the *cestui que trust* and the trustee, and was recorded upon their acknowledgment in the clerk's office of the County court of Fauquier.

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The defendant examined two witnesses, both of them nephews of the testator of the plaintiffs. One of them, Thomas H. Fitzhugh, stated that he had a conversation with the testator some four or five years before his death, in relation to the deed of trust. The witness had gone over to Thomas Fitzhugh's, at the instance of the defendant, to obtain his permission to sell three of these slaves. When he named the object of his visit, Thomas Fitzhugh, contrary to witness's expectations, readily acquiesced, merely remarking that he was sorry defendant's necessities were such as to require the course ; that in so doing he was depriving himself and wife of all means of support, when it was in his power so well to avoid it and keep his negroes. It was true he said Dudley had executed this deed, but that he (Thomas Fitzhugh) never claimed or expected any benefit therefrom. In fact, in all his conversation he throughout clearly expressed himself as having no claim to the property specified in the deed of trust, And he remarked that he had permitted Dudley to sell all that were worth anything. In answer to a question whether in his conversations with the testator he seemed to regard the defendant as his debtor for the amounts advanced to him, or did he treat the money as a gift, he answered, that he always understood it as a gift. The other witness stated that in a conversation with Thomas Fitzhugh he mentioned that the money was given to Dudley Fitzhugh, and he never expected anything but his services as compensation. The last conversation passed a short time before his death, at his own house.

It was proved that Thomas Fitzhugh died at an advanced age, probably over eighty years. He was an

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old bachelor, lived entirely alone, about three miles from the residence of the defendant. That he was very wealthy, having four large estates; and had not kept an overseer for twenty-five years. That the defendant was often called upon by him for his assistance in the adjustment of his accounts, and frequently in regard to other matters concerning his business; and that he was a favorite nephew.

When the cause came on to be heard the court directed an issue to be made up between the parties, and tried by a jury to be impaneled before the court, on the law side thereof, to ascertain: 1st. Whether the defendant rendered any services to the testator of the plaintiffs, at any time between the 22d day of September 1823 and his death. 2d. How much the defendant deserved to have for such services, if any were rendered.

Upon the trial of the issues the jury found that the defendant had rendered services to the testator of the plaintiffs within the time specified; and that he deserved to have for such services one hundred and fifty dollars *per annum* from the 22d of September 1823 until the death of the testator in November 1843, with interest thereon from the end of each year respectively. And the court being satisfied with the verdict, directed it to be certified to the chancery side of the court. The plaintiffs filed various exceptions to the issue directed, and the proceedings under it; but none of them have reference to the correctness of the verdict upon the evidence.

After the verdict was certified to the chancery court, another witness was examined by the defendant, by whom it was proved that Thomas Fitzhugh recognized his obligations to the defendant for services he had rendered and was rendering to him, equal and more than equal to the money advanced to him.

The cause came on to be finally heard in October

1847, when the court below, being of opinion that it was the understanding of the defendant and the testator of the plaintiffs that the services rendered by the former to the latter should be a satisfaction of the sums advanced from time to time, and mentioned in the deed of trust; that those services were continued up to the time of the death of the testator; and the jury having found that they were more than adequate to the satisfaction of the demand set up by plaintiffs, decreed that the bill be dismissed with costs. And the plaintiffs thereupon applied to this court for an appeal, which was allowed.

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Patton, for the appellants.

Morson, for the appellee.

ALLEN, *P.* This case is one of the first impression in this court, and I have had some difficulty in arriving at any conclusion satisfactory to my own mind. The difficulty has been somewhat increased by the conflicting pretensions relied on by the appellee to defeat the claim. The allegations of the answer that the testator had no intention of exacting payment when the money was advanced, and that the appellee without his knowledge executed the deed of trust and spread it upon record, are refuted by an exhibition of the deed itself. From that, as it appears in the record, it seems that the deed was actually executed by all the parties, including the testator, and recorded upon their acknowledgment. The debt must therefore have been considered as an actual debt at that time, and the deed accepted as a security for it. And as to the claim that the debt was actually paid by the services rendered to his uncle by the nephew: No account for them seems ever to have been kept or charge made for them; and although they may, with other considerations, have operated on the creditor in

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inducing him to forgive the debt, I do not think the evidence shows that either party treated those services in the light of business transactions entering into the accounts of the parties.

I think, however, in view of all the circumstances of this case, and the relation in which the parties stood towards each other, enough appears to show that if the debt has not been actually released, yet that the creditor, in favor of this debtor, has himself treated it as released, or, in the language of the books, dead in point of effect. That whether the uncle contemplated a gift or not when the deed was executed, or united in the transaction not with the intention of exacting payment of the money really advanced, but to protect the property of the nephew from other claims, it is, I think, manifest that long before his death he treated this debt as released and forgiven. In the case of *Wekett & ux. v. Raby*, 2 Bro. Par. Ca. 386, the circumstances were not as strong. There the deceased on his death bed desired his executrix and residuary legatee not to trouble his debtor for a bond debt, saying that he did not deliver up the bond, for he might want it more than the debtor, but when he died the debtor should have it; he should not be asked or troubled for it. The debtor had been counsel for the creditor, but a dispute had occurred between them when the bond was executed, and they had not been friendly thereafter. Lord Macclesfield decreed that the bond should be surrendered to be canceled and satisfaction acknowledged; and his decree, upon appeal to the house of lords, was affirmed.

In the recent case of *Flower v. Martin*, 2 Milne & Craig 459, 14 Cond. Eng. Ch. R. 459, the case of *Wekett & ux. v. Raby* was approved and followed. In the last case a father had taken a bond from the son for advances, under circumstances which induced the court to believe he did not intend to exact payment,

or to hold it as a security to be put in force against his son for the benefit of his estate, but rather as a check upon his future conduct. In these and other cases referred to in 2 Story's Eq. Jur. § 705 a, 706, 706 a, the debt was secured by bond or note, and its existence as a valid claim was undisputed. In the leading case of *Wekett v. Raby* it was regarded and treated by the creditor as a subsisting debt, which he, at the time of making the declarations on his death bed, had still a right to enforce; but not intending that it should be regarded as a debt due from his debtor to his estate, and to be put in force accordingly, the court gave relief. In the case before us the uncle was a bachelor of advanced age, and owning a large estate; the nephew resided near him, was a favorite nephew, and apparently poor and embarrassed with debt. When the money was advanced no note or bond seems to have been required or given, and the deed of trust contains no covenant to pay the debt. More than twenty years elapsed between the execution of the trust deed and the uncle's death. During all this time no demand was made for payment. The only evidence we have that the deed was regarded as a subsisting security by anybody arises out of the fact that the debtor, being desirous of selling some of the slaves for his own benefit, applied to the uncle for his permission to do so. It was readily given, until the security was nearly exhausted, it being shown by the proof that sales were made from time to time, and the answer averring that nearly all the slaves were so disposed of, and but three, not exceeding four hundred and fifty dollars in value, remained unsold. When applied to for his permission, the uncle declared that he never claimed or expected any benefit from the deed, and that he had permitted his nephew to sell all the slaves of any value. The fact that he did assent to such sales until the security was nearly exhausted

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proves the truth of his declaration that he did not claim any benefit from the deed, the only security or evidence of debt he held. In addition to this the uncle, on another occasion, is proved to have observed to another nephew, who was desirous of borrowing money from him, that the services of the appellee were equal, and more than equal, in value to him, to the money advanced.

The fact that services through a long course of years were rendered, is placed beyond doubt by the verdict of the jury upon the issues directed in the cause. There being no exception, spreading the facts upon the record, we must take it that they justified the finding of the jury. They find that the appellee rendered such services from the date of the deed in September 1823 to the death of the uncle in November 1843, and estimate their value at one hundred and fifty dollars *per annum* through the whole period. Without regarding these services in the light of payments or legal offsets, the fact that they were rendered, that they were regarded by the creditor as valuable—equal, according to his declaration, to the money advanced—is a circumstance tending strongly to confirm the conviction produced by all the other circumstances, that the uncle regarded the debt released and forgiven to his debtor. Such services furnished an additional inducement for the uncle so to regard the debt. It is a circumstance not appearing in the cases referred to, and makes this a much stronger case for relief than any of them. Taking into consideration the relationship between the parties; the fact that the appellee was a favorite nephew; the omission of the creditor to assert any claim under the deed during his life time, though he lived twenty years after its execution; the sales from time to time, with his knowledge and consent, for the debtor's benefit, of nearly all the slaves conveyed; his declaration that he

claimed no benefit from the deed ; his admissions that the services of his nephew to him were equal in value to the money advanced ; the fact established by the verdict of the jury, that valuable services were rendered, extending over the whole period intervening between the deed and the death of the creditor, I feel satisfied, that looking at this transaction as one exclusively between a creditor and his debtor, it was the intention of the former to treat the debt as forgiven and released to the debtor. I think, therefore, it is a case in which a court of equity might properly stay its hand, and refuse its assistance to the executors of the creditor seeking its aid to enforce this deed for the benefit of their testator's estate.

I am for affirming the decree.

The other judges concurred in the opinion of ALLEN, J.

DECREE AFFIRMED.

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Term.**PARRAMORE v. TAYLOR.**

May 26th.

1. In construing the Code, the rule of construction is that the old law was not intended to be altered, unless such intention plainly appears.
2. What does not constitute incapacity in a testator.
3. What is not an improper influence which will invalidate a will.
4. The Code of 1849, ch. 122, § 4, p. 516, in relation to the attestation of wills, does not require that the witnesses shall subscribe their names in the presence of each other.*
5. T subscribes his name to his will in the presence of C, and requests C to attest it, who does so. B is then called into the room, and T again acknowledges the paper as his will, and requests B to attest it, who does so, C being present when T acknowledges the paper to B, but not subscribing it or recognizing his subscription at that time, the whole, however, being done within a few minutes. The will was duly attested.

At the October term 1851 of the Circuit court of Accomack county a paper, purporting to be the will and codicil thereto of Thomas T. Taylor deceased, was propounded for probat by Edward W. Taylor, one of the nominated executors therein; and its admission to probat was opposed by Thomas H. Parramore and Sarah A., his wife; and Thomas H. Parramore dying during the controversy in the Circuit court, the opposition to the probat was continued by Sarah A. Parramore, who and the propounder of the will were the only children of Thomas T. Taylor. The will bears date the 24th of June 1851. It was written by James S. Corbin, and is attested by him and by Edward C. Bloxom and Littleton Walker. The codicil bears date the 7th of September 1851, and was also written by Corbin, and was attested by him and Robert J. and

*See the opinion of Judge *Moncure* for the statute.

William T. Silverthorn. The proceedings in the cause, and the facts on which the opinion of the court is founded, are stated by Judge *Moncure* in his opinion. The court below admitted the will and a part of the codicil to probat; and from that sentence Mrs. Parramore obtained an appeal to this court.

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R. T. Daniel, for the appellant.

Patton, for the appellee.

MONCURE, *J.* This is an appeal from a sentence of the Circuit court of Accomack, admitting to probat two testamentary writings purporting to be the will and codicil of Thomas T. Taylor. They were propounded by his son, Edward W. Taylor, the appellee, who is the principal devisee and legatee, and named executor; and were contested by his daughter, Sarah A. Parramore, the appellant, and her husband, Thomas H. Parramore, who is since dead; the said son and daughter being the testator's only children and heirs at law. They were contested on the grounds of, first, incapacity; secondly, undue influence; and thirdly, defective execution.

The case was first tried by a jury; but it was unable to agree, and was discharged. Afterwards it was agreed to submit the whole case, upon the law and the evidence, to the court, from whose sentence either party might appeal; and that, in the event of an appeal, it should be specially certified to the Court of appeals that the judge sitting on the trial of the issue heard, and was present at the examination of, all the evidence in the cause. The court decided to admit the will and codicil to probat, with the exception of a part of the codicil considered by the court to have been improperly inserted therein. The examinations of the witnesses and the documentary evidence were certified as the facts proved on the trial, and were

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ordered to be made a part of the record in the cause. The whole case is now before this court for revision of the sentence of the Circuit court thereon.

I will consider the grounds of opposition to the probat in the order above stated. But it seems to be proper, in the first place, to enquire, whether the testimony of James S. Corbin is to be regarded as credible. He is by far the most important witness in this cause; and if his testimony is to be believed, it conclusively settles at least two of the three questions arising in the case. He was the scrivener who wrote both the will and the codicil, as well as a prior will; was present at the execution and acknowledgment of all of them, and was a subscribing witness to all. It was of vital consequence to the contestant, therefore, to overthrow, if possible, the testimony of this witness; and an attempt was accordingly made to do so, or to weaken the force of the testimony as much as possible. The means mainly used for that purpose was a very long and close cross examination. No witness was introduced, no question asked, to impeach his general character for veracity or otherwise. The only evidence offered tending in any way to discredit him was that of Mrs. Young, a cousin of Mrs. Parramore, and, it would seem, a sister of her husband, Thomas H. Parramore. She testified that when the witness Corbin was formerly in attendance at court to prove the will and codicil, he dined with her husband, Dr. Young; and in a conversation between them on the subject, Corbin, in answer to a question of the doctor, whether the testator had to reflect in disposing of his property, said, "No, he recited or read it off as a school boy would a lesson; he (Corbin) said his brain was such that any impression might be made upon it." It is remarkable that her husband, who was also examined as a witness, and in answer to whose question the alleged statement of Corbin was

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made, did not remember it. The recollection of Mrs. Young as to the other circumstances of the visit and conversation was very indistinct. She said she did not know why the words of Corbin, before stated, made so strong an impression on her mind, unless it was confirming her in what she thought before, that her uncle was child-like. She admitted that Mrs. Parramore was a favorite cousin, and that she wished the will overthrown, because she thought, if left to himself, her uncle would never have made such a will. I have no idea that Mrs. Young, in giving her evidence, said anything that she did not believe to be true. But I think she was insensibly influenced by feelings of partiality, and misunderstood, or misconstrued, or did not rightly remember, the words of Corbin. The words, as stated by her, would have been in direct conflict with his sworn testimony given in court on the same day, and which seems to be substantially the same with his subsequent testimony in the case. Though subjected to the test of a close cross examination, his testimony is consistent in itself, and materially variant from none of the other testimony in the case. His intelligence appears from his evidence, and his general character for veracity is strongly sustained by several witnesses who have long known him, and whose testimony appears to be entitled to much weight. He ought, therefore, to be regarded as a truthful witness in the decision of this cause. I will now proceed to consider the grounds of opposition to the probat. And

First, as to the alleged incapacity of the testator.

The testator appears to have been a man of good common sense, and to have been prudent and careful in the management of his affairs. He was about seventy-five years of age when he died, and for some time previous to his death had been in the habit of drinking freely, and perhaps many times to excess. It is not pretended, however, that he was incapacitated by the ordi-

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nary effects of old age, or drunkenness; or that he was under the influence of ardent spirit, or any other kind of stimulant, at the time of the execution of the will or the codicil. The only ground of the alleged incapacity relied on is, that for a few months before his death, and until his death, he was supposed to be affected by a disease of the brain, which produced occasional convulsions and partial paralysis, and that two of these convulsions or fits actually occurred while he was engaged in dictating the will to the scrivener. The commencement of the disease appears to have been early in June 1851. The will was executed and acknowledged on the 24th of that month, the codicil on the 7th of September thereafter, and the testator died on the 29th of the latter month. Dr. Joynes, a witness apparently of great intelligence, skill and scientific information, attended him during his last illness, and gives a minute account of the disease, and of the condition of the patient during his several visits; which were on the 17th and 19th of June, on the 29th and 31st of August, and on the 4th of September 1851. The disease with which he believed the patient was affected was "softening of some part of the left side of the brain." And the account which he gives of its nature and effects is as follows: "That disease is a softening, that is to say, a diminution of consistence of one or more parts of the brain, generally limited in extent, varying generally from the size of a pea to that of an orange: in a few cases affecting the entire half of the brain, rarely, if ever, the whole of it. It makes its attack in a variety of forms; sometimes the symptoms are very much those of ordinary apoplexy, the patient falling senseless and motionless, and dying in a few hours. In some instances, after the disease has commenced in this way, the patient, after a time, recovers his senses, but remains palsied in one or more limbs, with frequently

more or less impairment of mind. In another class of cases, the disease begins with symptoms of inflammation of the brain, there being headache, fever, delirium, sometimes partial, convulsive movements, frequently with rigid contraction of one or more limbs, which is generally followed by palsy of the same limbs. In numerous cases, the approach of the disease is more gradual, the patient, perhaps, after suffering for a time with headache and giddiness, experiences some unusual sensation in one or both limbs of one side of the body, such as pain, tingling, &c. After a time the power of movement and the faculty of sensation in those limbs become impaired; this impairment increases until a total paralysis of those parts is the effect: partial convulsions may or may not precede or alternate with this palsy. Sometimes in the beginning of such cases there is a gradual impairment of the mental faculties, though in many instances they remain unaffected until the last moments or hours of life. It must be understood that the foregoing is a very general account of some of the leading forms of the disease, and that the symptoms themselves, and their order of succession, vary a good deal in different cases. Its usual termination is in death; though the interval between the first attack and death may vary from a few hours to several years."—"If the disease be limited to a small portion of the brain, I believe that it may continue for a considerable time without destroying the testamentary capacity of the individual." Being asked by the contestant in the cross examination, "Do you refer the disease of the testator to that class attended with inflammation and delirium, or to that in which there is no inflammation attending the softening of the brain?" the doctor answered, "I refer his case to that in which there is no inflammation." And in answer to another question of the contestant, he said, "I believe that softening of the brain

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may, without producing disorder of the intellect, produce a weakening of the will, an impairment of steady purpose, and a liability to be influenced by others. I also believe it possible that such disease might produce a perversion of the ordinary affections and dispositions."

In regard to the condition of the testator at the several visits, the doctor says that at his first visit, which was on the 17th of June, "the principal circumstance which attracted my attention was the occurrence of convulsions, affecting the right half of his body, at intervals. These convulsions continued for a minute or less at each return, and were followed by partial palsy of the right limbs and of the tongue; and this palsy gradually passed off in the intervals of the convulsions; so that before the return of the convulsion he had perfect use of all the limbs and of the tongue. A minute or two after the cessation of the fit, he would utter the word 'basket' two or three times, somewhat indistinctly, and then begin to talk, at first rather thickly, and afterwards with sufficient distinctness. In fact, after some time, his speech was entirely distinct and unaffected. The left side of his body seemed to be entirely unaffected either by the convulsions or by the temporary palsy which followed them. He complained of some feeling of fullness about the head, but I do not recollect that he complained of pain"—"I cannot speak with precision as to the intervals between the fits; but I would say, in general terms, that it was about an hour, more or less, while I saw him. As to the regularity of their return and duration, I am unable to speak, because he had only two, or at most three, fits during my first visit. The duration of each fit in which I saw him seemed to be about the same."—"As to the state of his mind during these convulsions, I know nothing; after a convulsion had passed off, and the faculty of speech returned, his mind seemed clear."

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In the perfect intervals of the fits he communicated with the doctor as a sane and intelligent patient. The doctor was with him, on this visit, about three hours and a half, and does not think there was more than a quarter of an hour of the time in which his mind was not apparently clear. The next visit was on the night of the 19th of June, just five days before the execution of the will. "At that time (says the doctor) the convulsions had ceased; the palsy had disappeared, and the other symptoms, which I have previously mentioned, were less marked; he seemed much better in all respects."—"I next saw him on the night of the 29th of August, about 10 or 11 o'clock; he was then laboring under a palsy, complete or nearly so, of the parts which had been affected at my first visit, except the tongue, which was only partially paralyzed, leaving his articulation, although somewhat thick and difficult, yet easily understood."—"The palsy, during the visit of which I speak, was permanent; it was neither absent nor diminished at any time during my visit, as far as I recollect. His mind was clear. I detected no delirium, incoherence, or other manifest disorder of the intellect. There was no convulsion during this visit, which lasted until shortly after sunrise next morning. I was in the room with Mr. Taylor some two or three hours of this time." The next visit was on the 31st of August; "his physical symptoms were much the same as at the visit of the 29th of August, nor do I think the state of his mind was materially different."—"He had no convulsions at this time."—"My next and last visit was on the 4th of September, about 11 or 12 o'clock in the morning; it continued probably two hours. At this time the tongue was much more affected by the palsy than at my two preceding visits. I experienced much difficulty in conversing with him. I was sometimes obliged to repeat a question two or three times before a clear answer could be obtained; and sometimes it

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required the assistance of persons standing around the bed to enable me fully to understand what he said. In other respects I recollect nothing particular to be noted in reference to his physical condition as differing from what it was at my previous visit. As it respects the state of his mind, I am not able to speak with as much confidence as at previous visits, because, owing to the great difficulty of speech, I conversed with him but little, and obtained most of the information which I desired, in regard to his condition since my last visit, from members of the family. So far as I conversed with him, his answers were rational. Another reason why I held but little conversation with him was, that he seemed but little disposed to talk. He appeared low spirited and somewhat fretful and irritable, and disposed to find fault with persons in the room if every attention was not promptly bestowed; he was also quite restless, requiring to be frequently lifted up and down." This visit was three days before the execution of the codicil.

Dr. West was the family physician of the testator at the time of his death; attended him during his last illness; thinks his mental condition was good about the period of the date of the will; thought he conversed as rationally as ever; saw no reason to doubt his capacity to transact ordinary business, and of disposing of his property in any way; thought he was capable of transacting his own business, such as paying and receiving debts, settling accounts, and giving and taking receipts, up to the last time he visited him, which was about a week before his death; and of course about a fortnight after the date of the codicil.

I have stated thus fully the evidence of the attending physicians, because it is entitled to great and peculiar weight in determining the question now under consideration. On this subject see the opinion of Carr, J., in *Burton v. Scott*, 3 Rand. 399, 403.

James S. Corbin, the draftsman of the will and codi-

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cil, had always known the testator; was well acquainted with him for the last thirty years of his life; lived within three or four miles of him for the last twenty years, and was intimate with him the larger portion of the time; thinks that at the time of making his will and codicil he was as capable or competent mentally to make a will as at any previous time. The facts stated by this witness fully sustain his opinion of the capacity of the testator. He says: "I wrote two wills for the testator; this in court is the second. At the time I wrote the first will he had before him his bonds and notes and a copy of his wife's will. After reading over the copy of his wife's will attentively, he remarked to me that he had promised his wife to make up his daughter's portion of land equal to his son's; but he believed she had already as many acres as he (Edward) had. I replied, 'Yes; but her land, a large portion, was not worth more than four or five dollars an acre, and Edward's, a portion of it, worth from twenty to thirty dollars an acre.' Here he used a slight exclamation, what I do not recollect. He then proceeded to add up the amount of his bonds and notes; after doing this, he said, with a long sigh, or breath, or something of the kind, 'I will make a will to please them, but I expect there will be a squabble over it.' This was the time of making the first will. Some ten or twelve days after this I was again sent for to go down to his house, and he told me he wished to make some alterations in his will. I asked him if it would not be better to destroy the first will and make a new one. He answered that he thought it would. He then directed me to destroy the old will, which I did, and he took his seat at the table and dictated the will now in court, which I wrote for him. During the time I was writing the will, and just before, he had an attack of paralysis or palsy, or whatever you may call it. He said he was

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like some old man, whose name he mentioned, who made a will and gave all his property to himself, and said he thought too much of his property to give it to any person while living. He had, I think, while writing the last will, two short attacks of paralysis, but appeared to me perfectly rational as soon as he could speak, and would commence dictating as soon as he could speak, with as much composure as he did before he was struck."

The witness was engaged two hours or more in preparing the will, and, after finishing it, read it carefully and slowly to the testator, who said, "Well, that will do," or words to that amount. It was then signed by the testator, and attested by two witnesses; after which the testator handed it to his son Edward, and told him to put it away. At some time between the writing of the will and the codicil, Edward W. Taylor told the witness he had shown the will to Mr. Fisher, a lawyer, who thought it was not explicit enough in regard to the bonds and notes, and said that his father wished to make a codicil to explain the nature of those gifts. Witness replied, that he would write it, if the testator requested it. Afterwards, the witness having been sent for by Edward W. Taylor, went to the house of the testator for the purpose of writing the codicil. After he had been there some short time, Edward W. Taylor said, "Father, Captain Corbin is here, and if you wish to make a codicil to your will, he will write it for you." The testator replied, "Let it alone till morning." "Some time after this, (says the witness,) when all or nearly all the other persons who were present had retired to bed, I suppose, and when there were no persons present except the testator and myself, and perhaps Mr. Robert J. Silverthorn, (one of the witnesses to the codicil,) the testator said to me, 'Edward wants me to make him executor alone, and to explain about the property given to him.' I replied,

‘ Well ’; and he went on to say, ‘ I intended to give him all the balance of my property which I had not given away before. ’ I said to him, ‘ Did you intend to give him all the negroes or not ? ’ And he said, ‘ Yes, everything except what I had given away before. ’ I may have mentioned to him the bonds and notes, but do not recollect every particular word or words that were passed between us that evening. ”

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The witness Corbin and Robert J. Silverthorn staid there that night. Next morning Edward W. Taylor came into the bed room of the witness, and said that his father then wished him to go down and write the codicil to his will. The testator was lying in bed, and witness wrote the codicil at a window not more than eight or ten feet from the bed. Testator did not dictate to witness what he said the over night, except in one general expression, which was, “ Write what I told you last night. ” Witness wrote the codicil according to what he understood from testator the night before, except the following clause: “ He also states that the loan of a plantation to his daughter, Mrs. Sarah A. Parramore, was intended as a consideration for her thirds in a plantation called Poplar Grove, now owned and occupied by David Taylor, which interest the said Sarah A. Parramore and Thomas H. Parramore are to convey to David Taylor, and, in case of failure, to forfeit an interest in this will to that amount. ” In regard to this, the witness says the testator “ did not dictate it to me. I think I received it from Mr. Edward W. Taylor, who was standing at his bed-side, and to whom I supposed at that time the testator had communicated it; but when I read the codicil to the testator, he objected to that clause, and said it ought not to have been put there; that he (Major Taylor) would send for Mr. and Mrs. Parramore, and have that matter settled. I offered readily to strike out the clause from the codicil, and left the bed-side where he

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was, where I had been standing reading, and walked towards the window with the intention of striking it out, but remarked that if they did convey that clause would be of no force. He (Major Taylor) replied, 'Let it alone until they come.' Consequently, I did not strike it out." When witness was writing the codicil he and testator could distinctly hear each other in a common tone of voice. Does not know where Edward was during the larger portion of the time: thinks he had been out of the room a part of the time. When he spoke to witness about the clause in relation to Mrs. Parramore, he was much nearer the testator than witness was, and much nearer to testator than to witness. His position then, as witness thinks, was casual or accidental. Witness did not hear testator dictate the clause in question to Edward, and does not suppose that he dictated it at that time, at all events. Edward said to witness, "Father wants you to put in a clause to compel sister to convey her thirds in Poplar Grove." The peculiar phraseology of the codicil in this respect was that of the witness. Has no doubt that Edward was distinctly heard by the testator, who made no objection at the moment, or before the clause was written. The codicil was read over to the testator after it was written, witness thinks twice; once before the objection was made, and once afterwards. And it was then executed by the testator, and attested by two of the witnesses. Mr. and Mrs. Parramore were then sent for. They came over very soon after; and witness says, "I think three deeds were shown or handed to them by Mr. Edward Taylor. One of the deeds, I think, was written by Mr. Fisher (I mean the counsel). I think this deed was intended to be given from Thomas T. Taylor to David C. Taylor. The other two were for the conveyance of Mrs. Parramore's thirds in the plantation called Poplar Grove. The one, I think, was written by Mr. Edward

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W. Taylor, and the other, I think, looked very much like the handwriting of Thomas H. Parramore. They (Mr. Parramore and wife) did not convey, telling Thomas T. Taylor that he was too sick to attend to business. He replied with warmth, looking at Mr. Parramore rather sternly, 'What do you mean?' Mr. Parramore replied that he only meant to say that he (Major Taylor) was too sick to attend to business. And I was not called on afterwards to strike out the clause." The deeds were handed to Mr. and Mrs. Parramore in testator's presence, and witness thinks, at his request; and testator said to them, "I wish you to fix this business." The testator had no convulsion when the codicil was written. One side of him, witness says, was completely paralyzed, and it was with much difficulty he could articulate his words. There were many words that he would attempt to articulate, and the persons present were compelled to pronounce them for him. He could articulate many words almost distinctly, and most of the words sufficiently to be understood by any person of common understanding.

The foregoing seems to be substantially the testimony of this important witness, so far at least as it affects the question of capacity. His examination was very much protracted, and he was made to repeat the same thing several times. I have endeavored to give his statement of the material facts, in their proper sequence. I think they fully sustain his opinion of the capacity of the testator, both at the time of making his will and his codicil. That opinion is also sustained by the evidence of the other attesting witnesses, and a great deal of other evidence in the case, which it is unnecessary to detail. No witness, I believe, expresses the opinion that the testator's mind was at any time unsound, except on the day of his death. No fact is proved from which unsoundness of mind at any prior time can be fairly inferred. The disease of which he

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died, while it paralyzed one-half of his body and impaired his speech, seems to have had little or no effect upon his mind. I am of opinion, therefore, that he had sufficient capacity to make the will and codicil.

Secondly. As to the alleged undue influence exercised upon him by his son, Edward W. Taylor.

The only material evidence on this subject, I believe, is to be found in the testimony of the witness Corbin, before stated, and in the fact that at the time of the testator's death, and for several years before, Edward W. Taylor and his wife and child or children lived with him, and seemed to have constituted his family. Mr. Corbin was a connection and near neighbor of the testator, and very intimate with him; and doubtless had as good an opportunity as any other person of knowing whether such undue influence existed or not. He says, "I know of nothing of the kind, of my own personal knowledge. I have never seen anything of the kind, and have no reason to believe there was, from any circumstance or occurrence coming under my own immediate knowledge or observation." Being asked, "Was there not a very long, strong and uninterrupted relation of affection between the testator and his only son, Edward W. Taylor?" he answered, "I verily believe there was." And being further asked, "Did not that son fear and reverence that father, and did he not always obey him to the day of his death?" he answered, "I believe he did." Mrs. Young, a sister, it appears, of Mr. Parramore, and niece of the testator, had also no doubt a good opportunity of knowing whether such influence existed or not. When asked, in cross examination, "Do you know of any fact of undue or improper influence, either by fraud or force, which caused Thomas T. Taylor to make this will?" she answered, "No, sir; I do not." In regard to the will, there is nothing in the record from which it can be inferred that he had any

agency in causing the testator to make it or to adopt any of its provisions. The testator seemed to be anxious to make his will, and twice requested that Mr. Corbin should be sent for. It does not appear that Edward W. Taylor knew what would be the contents of the will until after it was written, but rather the contrary, as he expressed something like surprise at some of its provisions. By the will the testator *lends* the land to his son for life, and gives it to his heirs at his death. He remarked to the draftsman of the will that Edward was not to be trusted with a large estate; that he would lend it to him, and then give it to his children. Edward was not present when the will was written, he and the witness Bloxom having been sent out of the room by the testator. It does not appear that there was a great deal of difference between the two wills which Corbin prepared; nor which, upon the whole, was more favorable to Edward, though it seems probable the first was.

In regard to the course of Edward in showing the will to counsel, Corbin, when first requested by the testator to write his will, had said: "You have a large estate; why do you not send for a lawyer, and have your will written in proper form?" To which the testator replied, "You can write one now, and if I get better, I can do so." There can be no doubt of the intention of the testator to include his negroes and the balance of his bonds and notes, after paying his debts and legacies, in the residue of his property given by his will to Edward. Corbin says, that after he had written all but the last clause of the will, the testator remarked, "Give all the residue to Edward." Corbin enquired, "Do you intend to give your son Edward all your negroes?" He replied, "Yes, they are worth nothing; give them to Edward." Corbin then wrote the last clause; and read the will slowly to the testator, who expressed his satisfaction with and executed

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it. The words of the clause would no doubt be construed according to the intention of the testator. The residue is described as "consisting of negroes, household furniture, and stock of horses, cattle, sheep, &c." The balance of the bonds and notes was probably not particularly mentioned, because it was supposed the amount would be small, after paying debts and legacies. The will was placed by the testator in the custody of Edward; and it is not improbable that it was shown by the latter to a lawyer at the former's request, in pursuance of the suggestion of Corbin and the purpose indicated to him by the testator, as before stated. But even if shown to a lawyer by Edward of his own accord, I see nothing in the fact from which fraud can be inferred, or which can be of much, if any, importance as a link in the chain of circumstances relied on to prove the fraud. The contents of the will were not intended by the testator to be concealed from Edward. It was handed to him open or unsealed. *He* knew his father's intention, but did not know that it was so clearly expressed in the will as to be free from doubt. He may, therefore, of his own accord, have shown it to a lawyer; and when advised that the residuary clause was not sufficiently explicit, he naturally desired that it should be explained by a codicil, so that there might be no room for future controversy. The codicil, then, gave him nothing that was not given, or intended to be given, him by the will. Its main object was to remove all room for doubt in regard to the meaning of the will. It nominates Edward sole executor, the will having made him coexecutor with W. Parramore. That matter was first mentioned to Corbin by the testator, who said, "Edward wants me to make him executor alone, and to explain about the property given to him." Having given Edward the largest portion of his estate, made him residuary legatee, and directed him to pay his

debts, it seemed to be fit that Edward should be sole executor, and he naturally desired to be so. The circumstance in the case which most materially affects the propriety of the conduct of Edward W. Taylor in regard to the will and codicil, is his connection with the insertion in the codicil of the clause in relation to Poplar Grove. It seems there had been an agreement between the testator and Parramore and wife, that the latter would release to the former Mrs. Parramore's dower interest in Poplar Grove, containing three hundred acres, in consideration that the former would convey to the latter another tract of three hundred acres. Accordingly, the testator had conveyed the former tract to David C. Taylor, and the latter to Parramore and wife, whom he desired to release her interest in the former to him; and a deed was prepared to be executed by them, which, with the other two conveyances, were the deeds before mentioned as having been handed to them on the day of the execution of the codicil. The testator and his son were both interested and anxious to have the deed executed by Parramore and wife; who, for some cause not disclosed by the record, were unwilling, or had failed, to execute the deed. It is probable they had had some conversation on the subject of putting something in the codicil to compel Parramore and wife to make the deed. The testator must have heard his son, standing by his bed-side, say to Corbin, who was drawing the codicil, "Father wants you to put in a clause to compel sister to convey her thirds in Poplar Grove," and by his silence he assented to what was said. It is true that when the codicil was read to him he objected to that clause, and said it ought not to have been put there, and that he would send for Mr. and Mrs. Parramore, and have that matter settled. The ground of his objection does not appear. It may have been the phraseology of the clause, which was that of the

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draftsman. He determined, however, after the effect of it had been explained by Corbin, to let it remain as part of his codicil.

The tract of land loaned to Mrs. Parramore for life by the will seems to be the same land conveyed to her and her husband for life, in consideration of her interest in Poplar Grove. In both the will and deed the land is described as occupied by Thomas Only. When the testator made his will he told Corbin that he loaned this land to Mrs. Parramore, in consideration of her thirds in Poplar Grove. When Corbin wrote the clause in the codicil, he wrote nothing more than what the testator had previously informed him was his actual intention, and what he had, under all the circumstances, every reason to believe the testator then wished to be embodied in his codicil. The testator would have preferred having the matter in regard to the release settled in his life time; but, failing in that, seems to have been willing to settle it by his will. I cannot, therefore, see in this circumstance, taken by itself, or in connection with all the other circumstances, sufficient ground for condemning the will and codicil, or either, as having been obtained by fraud or undue influence. The testator certainly made by his will a very unequal distribution of his property between his two children, and the record does not disclose any better reason for his having done so than that it was his will; which is an all-sufficient reason with courts of justice, however they may admire the rule of equality. The violation of that rule, without apparent good cause, may put them on the alert, and cause them to scrutinize the testamentary act with greater care. But being satisfied that it is the act of a competent testator, free from the undue influence of another, they are bound to give it full effect. Judge Carr has made some appropriate observations on this subject in *Boyd v. Cook's ex'or, &c.*, 3 Leigh 32, 50, 51,

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which I will not repeat. It is not uncommon for fathers to prefer their sons to their daughters, especially when they come to make their wills. The testator manifested such a preference otherwise than in making his will. He seems to have supposed, too, that in giving property to his daughter he was giving it to her husband. Another circumstance which may have operated upon him was that he had been the guardian of her husband, who had sued him for a settlement of his guardianship account; though this circumstance does not appear to have produced any ill feeling between them, or, if it did, the wound appears to have been healed before his death. But it is needless further to enquire about his motive for the preference. The nature of the disease under which the testator labored at the time of the testamentary act is another circumstance which requires of the court of probat the greatest possible care in determining whether or not the act was the offspring of a sound mind, free from the undue influence of others. I have endeavored to give due weight to all these circumstances in coming to my conclusions on the subject; and I am of opinion, not only that the testator's mind was sound when the act was done, as I have already said, but that it does not appear that any undue influence was exercised upon him by his son to induce him to execute the act, or any part of it. "The influence to vitiate an act (says a writer of high reputation) must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear." 1 Williams on Ex'ors, p. 39; 1 Jarm. on Wills, p. 29, note 1.

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The opinion I have expressed on the two questions I have been considering is greatly strengthened by the fact that it accords with that of the Circuit court; except so far as relates to a portion of the codicil, to which I will again advert. The weight to which the opinion of the court, which saw and heard the witnesses, is entitled in such cases, is shown by the cases of *Dudleys v. Dudleys*, 3 Leigh 436; *Jesse v. Parker*, 6 Gratt. 57; *Nock v. Nock's ex'ors*, 10 Gratt. 106, 111.

Thirdly. As to the ground of defective execution.

And 1st, as to the will. Corbin was sent for in the night, and requested by the testator to write his will. It was probably written between eleven or twelve, and one or two o'clock that night; the draftsman being engaged about two hours in writing it. The table and writing materials were brought by the direction of the testator, who then requested his son and Bloxom (one of the attesting witnesses) to step out of the room a little while. They accordingly went out, and the door was shut. The will was then written by Corbin, read to and approved by the testator, who signed it in Corbin's presence, and requested him to witness it; which he accordingly did, by subscribing it in the presence of the testator. Corbin says: "After witnessing the will myself, he (the testator) said, 'Call in Mr. Bloxom and get him to witness it too,' or words to this amount. I left the will on the table, and opened the door of the room with the intention of going after Mr. Bloxom myself; but I think I saw some of the family in the passage, and requested them to call Mr. Bloxom in. Immediately afterwards Mr. Bloxom came into the room, and the testator said to Mr. Bloxom, as I now think, either 'here, or there is my will,' I want you to witness it'; and he (Mr. Bloxom) did witness it in my presence. Mr. Bloxom, soon after this, either ordered or requested Mr. Taylor to order his horse and carriage, and he and his wife left for home. Major Taylor then handed the will to his son, Edward W.

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Taylor, and directed him to put it away. I had before this folded up the will and handed it to the testator. Mr. Edward Taylor took the will, and, as I now think, put it in the drawer of the bureau or chest of drawers in the room in which the testator was then lying. Next day morning Mr. Littleton Walker came over to Thomas T. Taylor's house, and I think that he and Edward Taylor and myself went from the porch to the room of the testator together. Mr. Edward Taylor got out the will; Major Taylor acknowledged it, and requested Mr. Walker to witness it. Mr. Walker turned to me and said he could not write his name, and requested me to write it for him. This I did, and he made his mark. This occurred about 7 o'clock in the morning." The testimony of Bloxom and Walker substantially agrees with that of Corbin in regard to their respective attestations. The will was subscribed by each of them in the presence of the testator. Corbin was present when the will was acknowledged to, and subscribed by Bloxom and Walker respectively; but neither of them was present when it was subscribed by Corbin, who did not subscribe it after either of the subsequent acknowledgments. Thus the will was twice acknowledged before two witnesses present at the same time, and these witnesses subscribed it in the presence of the testator. But one of the two witnesses subscribed prior in time to either of the two acknowledgments, and did not actually subscribe it in the presence of the other. On these two grounds it is contended that the execution is defective, and that under the new statute of wills, Code, p. 516, § 4, which governs this case, the will must be subscribed by at least two competent witnesses *after* it has been signed or subscribed in their joint presence; and must be subscribed by them not only in the presence of the testator, but *in the presence of each other*.

The words of the section are, "No will shall be
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valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the same is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It is contended by the counsel for the appellant that this part of the statute is almost a literal transcript of the statute, 1 Vict., ch. 1, § 9, which, before the enactment of our new Code, had been construed by the English courts according to the view maintained by him on each of the two grounds above mentioned; and that our statute ought to receive the same construction.

It is certainly true, as a general rule, that when an English statute, especially one of long standing, is adopted in this state, the settled judicial construction which it had received in that country, at the time of its adoption in this, is also adopted along with it.

But that rule hardly applies to the revision of 1849, in which our whole code of laws, civil and criminal, was revised and re-enacted. The rule which would seem to be more applicable to that revision is that the old law was not intended to be altered, unless such intention plainly appears in the new Code. The legislative mind was fixed on the then existing law as the text, to be altered only as occasion might seem to require. Great alteration was made in words and phraseology, while comparatively little was made in substance. The codes and statutes of other states were consulted and made contributory to some extent; but not with any intention of losing sight of our own, and adopting altogether the system of another state or

country on any branch of the law. Spencer, J., in delivering the opinion of the Court of errors of New York in *Taylor v. Delancey*, 2 Caine's Cases 143, thus speaks of the rule which is applicable to such a case as this: "Where the law antecedently to the revision was settled, either by clear expressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change. A contrary construction might be productive of the most dangerous consequences." The same principle has been recognized in other cases. *Yates' Case*, 4 John. R. 317, 359; *Matter of Brown*, 21 Wend. R. 316; *The-riat v. Hart*, 2 Hill's N. Y. R. 380.

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The 4th section of our present law of wills seems to differ, in substance, only in one or two respects from our former law, according to its settled construction. The first and perhaps most important difference is that the present law requires all wills to be in writing, with an exception made by the 6th section. The next, and perhaps only other, difference arises from the introduction of the words "present at the same time" after the word "witnesses" in the new law. It had been well settled under the old law, that a will might be acknowledged before the witnesses at different times. In *Dudleys v. Dudleys*, 3 Leigh 436, the will was attested by one witness in 1818, and by the other in 1825. The evil arising from this construction was, that the testator might be capable of making a will at the time of one of the attestations, and incapable at the time of the other, and only one attesting witness could prove the important fact of mental capacity at either time. Wills are frequently, if not generally, executed by persons *in extremis*, whose powers of mind as well as of body are gradually sinking. They are often capable one day, and incapable

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the next, of making a will. The words in question were introduced to remedy this obvious evil. There seems to have been considerable opposition in the legislature even to this change. The words "present at the same time," in the report of the revisors, were stricken out by a committee of the whole house of delegates; but were restored by the house itself. The provision in the new law that the will should be signed "in such manner as to make it manifest that the name is intended for a signature," was no change of the old law; but merely an express adoption of the judicial construction it had received in *Waller v. Waller*, 1 Gratt. 454. The words in the new law, authorizing the will to be *acknowledged* by the testator in the presence of the witnesses, were not in the old law, but they only embodied the long settled construction of that law. The words "but no form of attestation shall be necessary," in the new law, effected no change; no form of attestation being necessary under the old law. *Pollock & wife v. Glassell*, 2 Gratt. 439.

On the other hand, there are some material differences between the 4th section of our new law and the 9th section of 1 Vict., ch. 26. 1st. The latter requires the will to be "*signed at the foot or end thereof*"; the former requires it to be signed "in such manner as to make it manifest that the name is intended as a signature." 2dly. The latter requires that "such *signature* shall be made or *acknowledged* by the testator," in the presence of the witnesses; the former requires that "the signature shall be made or *the will* acknowledged by him," in the presence of the witnesses. 3dly. The latter does not even require the witnesses to be "credible," as the statute of Charles did; but, on the contrary, the 14th section enacts "that if any person, who shall attest the execution of a will, shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to

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prove the execution thereof, such will shall not on that account be invalid." The former requires the witnesses to be "competent"; thus working no change in the old law, but merely substituting in the new law a more appropriate word, "competent," for the word "credible," in the old law, which had been judicially construed to mean "competent." 4thly. The words "shall attest" in the latter (which were perhaps merely superfluous) are not in the former. 5thly. The former does not require a will, "wholly written by the testator," to be authenticated by attesting and subscribing witnesses; the latter makes no such exception.

Thus it will be seen that there is a closer correspondence, in substance at least, between our old and new law, than between the latter and the statute of Victoria. And I can see no good reason for giving to the decisions of the English courts upon their statute any greater weight in the construction of ours than they are intrinsically entitled to. If they appear to be founded on good reasons, and are not in conflict with our own decisions, they ought to be followed by us; otherwise not.

I will now proceed to consider the two grounds on which it is contended that the execution of the will and codicil in this case was defective: And

1. That the subscription of each of the two attesting witnesses must be made *after* the signature or acknowledgment by the testator in the simultaneous presence of both; whereas in this case the subscription of one of them was made *before*.

In support of this ground the counsel for the appellant relied on three decisions of Sir Herbert Jenner Fust, viz: *Allen's Case*, 7 Eng. Ecc. R. 131; *Simmonds' Case*, Id. 374; and *Moore v. King*, Id. 429. The first two were *ex parte* motions. In each of the three cases the will was subscribed by the two witnesses on different days; but the first witness was pre-

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sent at the acknowledgment before, and subscription by, the second; though he did not then resubscribe the will. In the last case there was this additional feature, that the first witness pointed out her signature to the second when the latter was about to subscribe the will. In each of the cases the decision was against the will. Whether that would have been the decision if, as in this case, the transaction had occurred at one and the same time, but one of the witnesses had signed an instant before the acknowledgment by the testator in the simultaneous presence of both, is perhaps not certain: though I think it may fairly be inferred that it would, from what was said by the judge in those cases, and in *Olding's Case*, Id. 341, and *Cooper v. Bocket*, Id. 537; in which two latter cases he decided that a will must be signed by a testator before it is subscribed by witnesses, whether the two acts occur at the same or different times. The opinion of this learned judge seems, therefore, to be in favor of the appellant on the question under consideration.

I must say, however, that I do not consider that opinion reasonable, and if it were unopposed by any countervailing decision, I would not be willing to follow it. But there are three decisions of this court which I think are in conflict with that opinion, and against the appellant on this question. It is true they were decisions under our old law; but I do not think there is any material difference between the old and new law in this respect. These decisions are *Pollock & wife v. Glassell*, 2 Gratt. 439; *Rosser v. Franklin*, 6 Id. 1; and *Sturdivant v. Birchett*, 10 Id. 67.

In *Pollock & wife v. Glassell* the name of the first witness was signed *diverso intuitu*, and whether in the presence of the testatrix or not does not appear; though it was certainly not signed at her request, and was signed before the name of the testatrix was signed. The authority of that case cannot be weak

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ened by saying that the question was not discussed by the counsel nor considered by the court. It cannot be supposed that the able counsel who argued, and learned judges who decided that case, would have overlooked so important a question, or passed it by without notice, if they had entertained a doubt about it. Nor can the authority of the case be weakened by saying that the codicil was executed under a power of appointment; for the whole settlement creating the power superadded a requisition not made by the statute of wills, it did not dispense with any of the statutory requisitions, and it was not pretended that a compliance with any of them was unnecessary. The question considered by the court was, whether the codicil was well executed according to the statute of wills, and had also the superadded requisition? The court, consisting of four judges, decided the question unanimously in the affirmative.

In *Rosser v. Franklin* the testatrix made her mark after the subscription of the witnesses. It was argued by the learned counsel against the will, that the witnesses must attest a perfect, not an imperfect instrument; a will signed by the party, and not a paper without a signature. And he cited *Olding's Case*, 7 Eng. Ecc. R. 341, and *Byrd's Case*, Id. 391, in which the precise question arose, and was adjudicated in that way, although both the attestation and signing occurred at the same interview, and the one immediately preceded the other. It was held by the court, however, in disregard of these decisions of the Ecclesiastical court, that "the fact whether in the order of time the testatrix made her mark before or after the subscription of the witnesses, is, under the circumstances, in nowise material, in so much as the whole transaction must be regarded as one continuous, uninterrupted act, conducted and completed within a few minutes, while all concerned in it continued present,

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and during the unbroken, supervising, attesting attention of the subscribing witnesses."

In *Sturdivant v. Birchett* the will was subscribed by all the witnesses out of the presence of the testator; but they immediately returned to his presence with the will. Their subscription was invalid until their return, and was made effectual by what then occurred, though they did not resubscribe the will.

These decisions of our own court are strongly sustained by cases decided elsewhere. The case of *Scift v. Wiley*, 1 B. Monr. R. 114, goes farther than any of our own cases in favor of the validity of a subscription by witnesses *before* the signing or acknowledgment by the testator. In that case two of the witnesses subscribed the will some hours before it was signed by the testator; but having remained with him until it was signed by him in the presence of themselves and another, and having then again acknowledged their respective signatures as subscribing witnesses, their subscription was held to be valid. To resubscribe their names, said the court, "would have been a superfluous and puerile act of mechanical repetition, not necessary for identification; because they had once subscribed the same paper in the presence and at the request of the testator, and which fact was recognized by him as well as by themselves, after his own name had been subscribed, and when the document, thus recognized and identified, was finally and conclusively published as his will; nor can we perceive any other end of either utility or security that could have been promoted by again subscribing names already sufficiently subscribed." For the other cases on the subject, I refer to the opinion of Judge Lee in *Sturdivant v. Birchett*, in which they are fully collected and commented on.

The case under consideration is stronger in favor of the will than either of the four last cited. In this

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case these important circumstances concur, some one or more of which did not exist in either of those cases, viz: *both* of the witnesses subscribed their names as such to the will *in the presence and at the request* of the testator, *after* it had been perfected by his signature, and he then acknowledged it in their joint presence: The whole transaction having been begun, continued and ended at one time and without interruption. And I think there existed in neither of those cases a single essential circumstance which did not exist in this. For though there was no *verbal* recognition by Corbin of his signature after the acknowledgment by the testator in the joint presence of the two witnesses, there was an *actual* recognition of it by him, at least as effectual as words could make it.

I conclude, therefore, that both reason and authority are against the appellant on the first ground on which he rests his objection to the execution of the will; and I will now consider the other ground, which is

2dly. That the witnesses must subscribe the will *in the presence of each other*.

The old law certainly did not require the witnesses to subscribe in the presence of each other. As the acknowledgment might be made before them separately and at different times, it followed necessarily that they might subscribe separately and at different times. Nor does the new law *expressly* require them to subscribe in the presence of each other. But it is contended that this is implied by certain phraseology used in the new law, and not to be found in the old. That phraseology is, that the acknowledgment by the testator must be "in the presence of at least two competent witnesses, *present at the same time*; and *such* witnesses shall subscribe the will in the presence of the testator." The statute of Victoria uses nearly the same words; the only difference being that the word "competent" in our law is not in that statute,

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and the words "shall attest and," which in that statute precede the words "shall subscribe," are omitted in our law ; but that difference is merely verbal in regard to the question under consideration. It is admitted that the two laws in this respect are substantially identical ; and it would seem they ought to receive the same construction. There has yet been no judicial construction of our law. But a case has been recently decided by the judicial committee of the queen's privy council in England, which was much relied on by the counsel for the appellant, and is supposed to have conclusively settled that the statute of Victoria requires the witnesses to subscribe in the presence of each other. That case is *Casement v. Fulton*, decided in 1845, and reported in 5 Moore's Privy Council Cases, p. 130. It was an appeal from the Supreme court of judicature at Calcutta, and arose on the 7th section of the India will act, which is a copy of the 9th section of the statute, 1 Vict., ch. 26, except that, like our law, it omits the words "shall attest."

The case was this : A testator signed his will in the presence of a witness, who subscribed it in his presence ; about two hours afterwards, upon the arrival of another witness, the testator, in the joint presence of the former witness and the other subscribing witness, acknowledged his signature at the foot of the will. The second witness then subscribed the will, and the first witness, in his and the testator's presence, acknowledged his subscription, but did not resubscribe. It was held by the judicial committee (affirming the sentence of the Supreme court at Calcutta) that the requirements of the act had not been sufficiently complied with ; it being necessary that both witnesses should be jointly present at the same act of the testator, and jointly subscribe it in his presence. Lord Brougham, in delivering the opinion of the committee, said : "We think the words admit of no other con-

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struction, for it is, 'and such witnesses shall subscribe.' Now this forms one sentence with the preceding words, 'present at the same time,' and 'such' must plainly be read, 'such present witnesses, or such witnesses so being present at the same time.' 'Such' describes not merely the names of the witnesses, but all that is previously enacted respecting them. One quality of these witnesses is their being present at the same time. Therefore, we cannot limit the meaning of the large word of reference, 'such,' to the mere names or persons of the witnesses; it must embrace what had just been said of their presence; it must mean the witnesses, &c., present at the same time."

It will be observed that in *Casement v. Fulton* the will was signed by the testator and subscribed by one of the witnesses at one time, and the acknowledgment by the testator, in the joint presence of both witnesses, was at a different and subsequent time. And it had been decided by the English Ecclesiastical court, in the cases before cited, that such an attestation was not sufficient; even though the first witness acknowledged his signature at the time of the acknowledgment by the testator in the joint presence of both witnesses. If these cases were regarded as authority, there seems to have been no necessity for deciding, if it was decided, in *Casement v. Fulton*, that the witnesses must subscribe in the presence of each other; for the attestation was otherwise insufficient. It will also be observed that there is a very important difference between that case and the one under consideration, in this, that in the latter the whole transaction occurred at one and the same time; there being no breach of continuity, and little if any greater interval between the different parts of the transaction than the necessary order of sequence required. The decision of the committee might possibly have been different, if the facts before it had been like the facts of this case,

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with the single exception that both of the witnesses had signed *after* the testator: a fact decided to be material by the English courts, but immaterial by ours. But whatever would have been its decision in such a case, and whatever may have been its actual decision in the case before it, there can be no doubt, from the language used by Lord Brougham, that in the opinion of the committee the statute requires the witnesses to subscribe their names in the presence of each other. The opinion is certainly entitled to great respect: And if it had been before the legislature when the present law of wills was enacted, it might have had a very important influence in the construction of our law.

But that opinion was not before the legislature; and it is almost certain that not a member of that body had then any knowledge or information of any such opinion, or that any such case had been decided. The case had not, I believe, been reported in any form in this country. There has yet, I believe, been no American edition of Moore's Privy Council Cases; and the London edition of that work has, during the present year, for the first time, been added to our state library. The 5th volume of the work, which contains that case, embraces the decisions of the committee during the years 1845-47, and could not have been long published even in England when the new law of wills was enacted in this state. The last volume of Reports of English Probat Cases, which had then been published in this country, was 7 Eng. Ecc. Rep., containing 2 and 3 Curteiss. While that volume, as we have seen, contains several cases bearing upon the first ground of objection to the will in this case, it contains none which can have any material effect upon the second ground of objection, now under consideration. Nor is there any such case in any prior volume of English Probat Cases. Indeed, I believe 1 Curteiss com-

mences about the time that the statute of Victoria went into operation. On the contrary, it is manifest from the decisions of Sir Herbert Jenner Fust, in some of the cases before cited, that in his opinion the statute does not require the witnesses to subscribe in the presence of each other; though he is of opinion that it requires both of them to subscribe the will immediately after it is signed by the testator, or his signature acknowledged in their joint presence. In *Cooper v. Bockett*, 7 Eng. Ecc. R. 542, he expressly says: "By the 9th section of the act of parliament, it is absolutely necessary that the deceased shall have signed the will, or have acknowledged his signature, in the presence of two witnesses present at the same time, and that they should have attested it in the presence of the testator, *though not of each other*." While *Casement v. Fulton* was unknown to the legislature when the present law of wills was enacted, *Cooper v. Bockett* was reported in a volume which had some years previously been published in this country, and was then in the state library. If the construction given in either case can be considered as having been tacitly adopted by the legislature in the enactment of our law, it is that given in the latter, rather than that given in the former case. The opinion given in the former is, therefore, entitled to no other consideration in this case than that which is always due to the opinion of learned jurists, and that which may be due to the reasons on which it is founded.

Giving to the opinion expressed in *Casement v. Fulton* all the consideration to which it is entitled, I must say that I cannot see the force of the reasons on which it is founded. It seems, almost entirely, to rest on the import of what is called "the large word of reference, such;" which, it is supposed, "describes not merely the names of the witnesses, but all that is previously enacted respecting them." It "must plainly be read

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(says Lord Brougham), such present witnesses, or such witnesses so being present at the same time." Admitting this to be the true import of the word "such," I think it by no means follows that, according to the grammatical construction of the sentence, the witnesses are required to subscribe in the presence of each other. "Such witnesses so being present at the same time" when the signature is made or acknowledged, surely need not of necessity subscribe in the presence of each other.

But whatever may be said of that case, I think the legislature of Virginia, in the enactment of our new law, did not intend to require the witnesses to subscribe the will in the presence of each other. It was a very important change in the law to require them to be together when the will is signed or acknowledged. Good reasons existed for that change; and yet, as I have before remarked, it was strongly opposed in the legislature. Surely no greater change was intended than the words express. If the supposed change had been intended, it would have been made plainly, and not by mere implication, or the use of a word of equivocal import. The obvious mode of making it would have been by the insertion of the words "and each other," so as to make the sentence read "and such witnesses shall subscribe the will in the presence of the testator *and each other*." The express requisition that they shall subscribe "in the presence of the testator," seems to exclude any implication that they shall subscribe "in the presence of each other." There would have been as much reason for expression in the one case as the other, if both had been intended. The word "such" would have had as much efficacy in requiring the act to be done by the witnesses in the presence of the testator, as in requiring it to be done in the presence of each other. The law of wills should be plainly written, and no room should be left

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for doubt or implication. It is a law of almost universal application, and must often be acted on by unlearned persons, in a situation which precludes the possibility of obtaining professional aid. The most important family settlements, which are often postponed to the last day or hour of life, may depend upon an observance of its requisitions. How important then that it should impose no needless requisition; none that is not productive of some substantial good; and that it should plainly express what it means. A requisition that the witnesses shall subscribe in the presence of each other would be a fruitful source of litigation, would defeat many fair wills, and would, I think, be productive of no corresponding good. It would very much clog the exercise of the testamentary power, without throwing around it, so far as I can perceive, a single additional safeguard. It would render it necessary to enquire, in every case, whether the witnesses, when they subscribed the will, were not only in the presence of the testator or in the range of his vision, but also in the presence of each other or in the range of each other's vision. It would be questionable whether range of the vision would be sufficient in regard to the witnesses *inter se*, and whether actual sight would not be necessary. For though a testator may dispense with actual sight of the witnesses if they are in the range of his vision, it being his own matter, it would, for that very reason, be doubtful whether the witnesses could dispense with actual sight of each other. Nothing is more common or natural than for a scrivener to subscribe a will as a witness before his fellow witness is called in to join him in the attestation; or, for a witness called on to attest a will, after doing so, to turn his back and walk off without noticing what is done by others afterwards. No case could present a more striking illustration of the application of these remarks, and the ill effects of

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such a requisition, than the case under consideration. The two attesting witnesses, Corbin and Bloxom, being in the room with the testator, the latter requests Bloxom to step out awhile. The testator and Corbin being then alone in the room, the door is closed, and the will is written by Corbin, signed by the testator, and subscribed by Corbin in the presence of the testator, and at his request. The testator then requests Corbin to call in the other witness, that he may subscribe it also. Bloxom is accordingly called in from another room, comes immediately in, and the three being then alone in the testator's room, and the will lying on the table with the names of the testator and Corbin thereto just subscribed, the testator acknowledges the will, and at his request Bloxom subscribes it in the presence of the testator and Corbin, and the will is then handed by Corbin to the testator. If this will were defeated because the witnesses were not in the presence of each other when Corbin subscribed it, then indeed might it be said that substance would be sacrificed to form, and the end of the law to the means used for attaining it. But I think form as well as substance, the means as well as the end, sustain the validity of this will, and that its execution is not defective on the second, any more than on the first ground relied on by the appellant.

2dly. As to the codicil.

The facts in regard to the execution of the codicil are very much like those in regard to the execution of the will. Many of them have been already stated, and need not be repeated. Corbin and Robert J. Silverthorn, two of the subscribing witnesses, spent a night together at the testator's. Early next morning the codicil was written by Corbin, who signed the testator's name thereto in his presence, and at his request; the testator made his mark in the presence of Corbin, who, in his presence and at his request, subscribed it

as a witness. R. J. Silverthorn, who had not come down stairs, was then called in by Corbin to witness the codicil also, and accordingly came in; when Corbin took up the will and carried it to the testator, who, according to Corbin's testimony, said: "I acknowledge this, and want you to witness it"; or, according to R. J. Silverthorn's testimony, Corbin asked the testator if he acknowledged it, and the testator said he did. R. J. Silverthorn then subscribed it in the presence of the testator and of Corbin.

The grounds of objection to the execution of the codicil are the same as those taken to the execution of the will; and the facts in regard to each being substantially the same, I am of opinion that the codicil was well executed, for reasons which have been already given. I think it makes no difference whether the instrument was called a codicil or not by the testator at the time of its acknowledgment, and that the principle, declared in the cases of *The British Museum v. White* and *Rosser v. Franklin*, is at least as applicable to the new law as to the old. It is necessary that the testator should understand the contents and nature of the instrument when he executes or acknowledges it; but not that he should call it by any particular name, or even by any name at all. The old law, by judicial construction, accepted acknowledgment, in lieu of signature, by the testator in presence of the witnesses, and did not require the instrument to be named in the acknowledgment. The new law adopts that construction, by expressly authorizing such acknowledgment, which may be made in any form in which it might have been made under the old law. No formula of acknowledgment is prescribed by law.

I am therefore of opinion that there is no error in the sentence of the Circuit court to the prejudice of the appellant. This opinion, however, is intended to

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be referred and confined to the peculiar facts of this case; and especially the important fact that the whole transaction in regard to the execution and attestation of the will occurred at one and the same interview, and without any breach of continuity. The same observations apply to the codicil. I do not mean to say that either would have been well executed and attested if there had been a substantial interval of time between the acknowledgment by the testator in the joint presence of the two witnesses, and the subscription by the witnesses or either of them. As was said by my brother Lee in *Sturdivant v. Birchett*, "it will be quite time enough to decide that question when a case requiring it to be decided shall come before us for adjudication."

My opinion is intended to have no reference to the attestation of the will by Walker, or the codicil by William T. Silverthorn; but to be confined to the attestation by the other two witnesses to each.

But I think there is an error in the sentence to the prejudice of the appellee, in refusing to admit to probat that clause of the codicil which relates to Poplar Grove. Though the testator at first objected to that clause, and said it ought not to have been put there, and that he would send for Mr. and Mrs. Parramore and have that matter settled, yet it does not appear that any fraud was used in having the clause inserted; and when the effect of it was explained to him by Corbin, the testator refused to let it be stricken out, and executed and acknowledged the codicil containing the clause as part thereof. The execution was not conditional, but absolute; and the codicil was not afterwards revoked in whole or in part.

The result is that I am for affirming so much of the sentence as admits the will and part of the codicil to probat; for reversing so much as refuses to admit the

residue of the codicil to probat; and for admitting such residue to probat also; with costs to the appellee as the party substantially prevailing.

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LEE and SAMUELS, *Js.* concurred in the opinion of *Moncure, J.*

ALLEN and DANIEL, *Js.* dissented.

SENTENCE REVERSED *in favor of the appellee.*

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STAINBACK v. THE BANK OF VIRGINIA.

May 30th.

1. The notarial protest of a foreign bill of exchange states that the notary took the bill to the counting-house of the drawee, and there exhibited it to a clerk of the drawee, and demanded acceptance thereof; and that the said clerk replied that the same could not be accepted. **HELD:** That the protest is sufficient to bind the endorser.
2. Parol evidence that the clerk was authorized to refuse acceptance of the bill is admissible in an action by the holder against the endorser.
3. As the protest is sufficient itself to bind the endorser, if parol evidence was not admissible to prove the authority of the clerk to refuse acceptance of the bill, yet its admission could not injure the defendant, and therefore it is no ground for reversing the judgment.
4. A bill drawn in Petersburg, Virginia, on a house in London, was protested for nonacceptance on the 5th of April 1843. The next Cunard steamer sailed from Liverpool for the United States on the 19th of that month, and notice of the dishonor of the bill was sent by that steamer. At that time these steamers carried the mail between the two countries, under a contract with the British government; and it was the usual mode of transmitting letters. There were, however, regular lines of sailing packets between London and Liverpool and the United States, for which letter bags were made up at the London post office, and such packets sailed from London or Liverpool on the 7th, 10th and 17th of April 1843. But it was probable that the steamer of the 19th would arrive before any of them. **HELD:** The notice was sufficient.

This was an action of *assumpsit* in the Circuit court of Petersburg, brought by the Bank of Virginia against Littleberry E. Stainback, upon a bill of exchange for one thousand pounds sterling, drawn by F. C. Stainback, of Petersburg, upon T. W. Clagett, of the city of London, endorsed by the defendant, and protested for nonacceptance. Upon the trial the plaintiff introduced the bill of exchange, which bore date the 20th

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of February 1843, and was made payable sixty days after sight; and then offered in evidence the protest, which stated that on this day, the 5th of April 1843, at the request of Call, Martin & Co., of London, bankers, bearers of the bill of exchange, whereof a true copy is on the other side written, I, John Harrison, of the city of London, a notary public, &c., went to the counting-house of T. W. Clagett, Esquire, within this city, upon whom the said bill is drawn, and, speaking to the clerk, exhibited unto him the said bill, and demanded acceptance thereof, whereunto he answered that the same could not be accepted. Therefore I, the said notary, at the request aforesaid, have protested, &c.

The plaintiffs also offered evidence in respect to the presentment and dishonor of the bill, and the usage of London as to the mode of presenting bills for acceptance. The defendant objected to this evidence, and also to the protest, but consented that it should be heard, it being agreed by the court and the counsel for the plaintiffs, that all objections to the evidence might be made after it was heard, as if made before.

The plaintiffs then offered evidence to prove that it is, and was in April 1843, the usage of merchants and bankers in London to leave a bill for acceptance on one day, and to call for it on the next, leaving it with the drawee in the mean time; that if the bill be returned without acceptance, the holder puts it into the hands of a notary, who again presents it at the place of business of the drawee for acceptance, and, in case of refusal to accept by the drawee, or by a clerk or other person employed therein, makes out the protest; and that a refusal by a clerk to accept under such circumstances is, by the custom of London, a sufficient dishonor to charge the previous parties; and that the usage had been observed in this case.

The plaintiffs further offered evidence to prove that

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in April 1843 the steamers of the Cunard line sailed from Liverpool for Boston twice, the days of sailing being the 4th and 19th days of the month; that the steamers of that line then carried the mails between Great Britain and the United States, under a contract made in 1841 with the British government; that it had been the usage of the London post office, since that contract, to forward all letters addressed to the United States by that line, unless specially directed to be forwarded by other vessels, notwithstanding that, in the interval between the delivery of any letter into the office and the sailing of a steamer of that line, one or more other vessels, steam or sailing, might leave Great Britain for the United States; and that merchants generally, if not invariably, receive their letters from Great Britain by that line, and did so in April 1843; that it was the usage of merchants, bankers, &c., of the city of London, in April 1843, to forward notices of protest to parties in the United States by the steamers of that line, and that such notices are, by the usage of London, considered sufficient, if dispatched by the first mail made up in London after the dishonor of the bill, for conveyance to the United States by that line.

The defendant offered evidence to prove that in April 1843 there were five regular lines of sailing packets between New York and Liverpool, the regular days of sailing each way being the 1st, 7th, 13th, 19th and 25th days of each month; that at the same time there were two regular lines of sailing packets between New York and London, which sailed from London on the 7th, 17th and 27th days of each month, and from Portsmouth on the 1st, 10th and 20th days of each month; that it was the usage of all these packets at that time to carry letter bags, which were made up at the post office, and that such is still the usage; and that it was, in April 1843, and still is, the

usage of the London post office to issue, daily, a sheet called the "Packet List," announcing the days of sailing of packets from London and Liverpool for the United States and other foreign countries.

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The defendant also offered evidence to prove that it was, in April 1843, the usage of merchants and bankers in London and in New York to forward notices of dishonor across the Atlantic by the first regular packet after the dishonor, whether using sails or steam, or both; that the usage of London was, and had long been, to deposit in the post office, the next day after the dishonor of a bill, a notice addressed to the party in the United States, to be forwarded by the next mail, and that the usage in London did not require or authorize the notice to be withheld for Cunard's line if a packet of any other regular line sailed in the interval.

The evidence on both sides being closed, the defendant objected to the protest as evidence in the cause, on the ground that it did not state facts sufficient, if true, to make out the dishonor of the bill for nonacceptance, and moved the court to exclude the same from the jury; or, if the court should admit the protest as evidence, to instruct the jury that it is not competent for the plaintiffs to add to or explain the protest, or to prove the facts of presentment, demand and refusal, or either of them, or the circumstances of either, by parol or other extrinsic evidence.

Whereupon the court permitted the said protest to go in evidence to the jury, and refused to give the instruction asked for; but instructed the jury that the said protest is sufficient, provided the jury believe from the evidence in the cause that the clerk to whom the said bill was presented by the notary for acceptance was authorized by the drawee, T. W. Clagett, to refuse acceptance thereof.

And then the defendant, by counsel, moved the

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court further to instruct the jury as follows: "If you believe that the bill on which this suit is founded was protested for nonacceptance on the 5th day of April 1843; that the letter from the holder, containing notice to the plaintiffs of the nonacceptance, was written on the 17th of April, and forwarded by the Cunard steamer of the 19th from Liverpool to Boston, that being the first steamer of that or any line that left England for the United States after the date of the protest; that during the interval between the 5th and 17th days of April one or more regular sailing packets left London for New York, by which the holders of the bill might have forwarded the notice; and that during the same interval one or more regular sailing packets left Liverpool for New York, the regular days of sailing of which were known in London, by which the holders of the bill might have forwarded the notice; that mails or letter bags were regularly made up at the London post office for the regular sailing packets from that city, and also for those from Liverpool to New York; then the notice of dishonor was not despatched in due time, and you should find for the defendant. And that this is so, although you find that the Cunard line of steamers carried the mail between the United States and Great Britain, under a contract with the British government; that commercial letters, from merchants in Great Britain to their correspondents in the United States, were usually forwarded by that line, and that the steamer of the 19th of April might have been reasonably expected to arrive as soon as any of the sailing packets referred to, or sooner." But the court refused to give said instruction, and instructed the jury that the "notice of the dishonor of the said bill given to the defendant was sufficient, if the jury believe from the evidence that the Cunard line of steamers was the regularly established mail line between Great Britain and the United States,

and was the regular, ordinary mode of communication generally used and adopted by merchants, bill brokers, and other men of business in Great Britain, as the channel of communication from that country to this; and that such notice was transmitted by the first steamer of that line which left Great Britain after the protest of said bill."

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To these several opinions of the court the defendant excepted.

The jury found a verdict for the plaintiffs, and assessed the damages at five thousand one hundred and eighty-five dollars and five cents, with legal interest on four thousand seven hundred and eleven dollars and eleven cents from the 24th of February 1843, that being the day when the bill was discounted by the bank, until paid; and the court rendered a judgment according to the verdict. Whereupon the defendant applied to this court for a *supersedeas*, which was awarded.

Joynes and Patton, for the appellant.

D. May and Stanard, for the appellees.

SAMUELS, *J.* Two questions are presented by the record before us:

1st. Whether the protest made by the notary is sufficient in itself, or when aided by the parol proof offered, to charge the plaintiff in error as endorser.

2d. Whether the notice of dishonor was duly forwarded to the endorser, so as to charge him.

As to the first: The protest sets forth the facts that the notary took the bill on which the suit is brought to the counting-house of Clagett, the drawee, and, speaking to a clerk, exhibited the bill and demanded acceptance thereof; whereunto he answered that the same could not be accepted; and that thereupon the notary protested the bill for nonacceptance. In the

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argument here the plaintiff's counsel made but one objection to the sufficiency of the protest; that is, that it does not state that the clerk of the drawee had authority to refuse acceptance. This objection should not prevail, if the protest had no extrinsic support: The most formal words could not more fully express the notary's opinion of the clerk's authority in the premises than is set forth in the protest. The notary, at the counting-house of the drawee, exhibited the bill to a clerk, demanded acceptance, which was refused, the answer to the demand noted, and thereupon the bill protested. This means that in the judgment of the notary it was proper to exhibit the bill to this clerk, and demand acceptance from him; that the clerk had authority to act on that demand; that his answer was a proper refusal: And upon all this the notary made his protest, which plainly enough expresses his opinion in regard to the sufficiency of every step on which he founded that official act.

The protest in this case is in the same form as that in *Nelson v. Fotterall*, 7 Leigh 179. In that case the whole court seems to have thought that parol proof was admissible to show the clerk's authority to refuse acceptance; two of the judges thought it necessary in aid of the protest; two others thought it unnecessary, and that the protest of itself was sufficient: It was not intimated by any one, that if the protest did not sufficiently verify the fact of the clerk's authority, parol proof was inadmissible to supply the defect. The court is the proper tribunal to decide what facts are proved by written documents. If the court, as it might have done, had decided that the protest proved a proper demand, and the other facts set forth therein, it was unnecessary, and therefore improper, to hear parol proof in regard to it, unless proof had been previously offered to assail the truth of facts alleged therein. If this be error at all, it certainly is not to

the prejudice of the plaintiff in error here; it can do him no harm, after facts are proved by appropriate written testimony, the truth of which is in nowise impeached, to admit parol proof of the same fact.

Thus, whether we regard the protest as sufficient in itself, or as supported by the parol proof fully showing the clerk's authority and other facts, the court did not err to the prejudice of the plaintiff in error in permitting the protest and evidence to go to the jury: The parol proof established the fact that the clerk had authority to refuse an acceptance.

As to the second: The law requires notice of dishonor of commercial paper to be transmitted to the parties thereto, for the purpose of enabling them to do what is needful to protect their interests; to this end it may be important to have early notice, and the law requires it to be given. In the case before us the notice was sent in a mode which would bring it to the hands of the plaintiff in error at the earliest practicable day: Yet it is alleged that it should have been sent by another mode, which, although it might have commenced the transmission at an earlier day, yet would not have delivered it so soon as the mode adopted. If we could yield to the argument of the plaintiff's counsel, we should sacrifice the object of the law. The notice was transmitted in the mail by an ocean steamer belonging to the Cunard line, which line carried the mail from Great Britain to the United States. It was sent by the first steamer which started after the bill was dishonored. This brings the case within the stringent rule of requiring that the notice be sent by the first mail. It appears, however, that there are regular lines of sailing packets from London (the place of the drawee's residence) to the United States; that these packets carried letter bags made up at the London post office; and that the times for their sailing from Great Britain occurred between the day

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of the dishonor of this bill and the day of the steamer's leaving. It further appears, that although a sailing packet should leave on the regular day for her-departure, and thereafter a steamer should leave on her regular day of departure, the steamer would probably arrive first in the United States. It further appears, that the line of mail steamers is used by a very large majority of business men for the transmission of letters from Great Britain to the United States. There can be no question that, of these two modes of transmission, the proper one was adopted. This one has in its favor the facts that it carries the mail, that it is the ordinary mode of transmission, and that it may be expected to deliver a letter at an earlier day than the other; that other having in its favor the facts that it starts at an earlier day, and carries a letter bag. There is nothing to counterbalance the fact that the other line will deliver the letter at the earliest day. I think the notice of dishonor was duly transmitted.

I am of opinion to affirm the judgment.

The other judges concurred.

JUDGMENT AFFIRMED.

Richmond.**STAINBACK v. THE BANK OF VIRGINIA.**

May 26th.

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1. A power of attorney to draw, endorse, or accept bills, and to make and endorse notes, negotiable at a particular bank, in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal: And an endorsement of a bill by the agent, in the name of his principal, for the benefit of the agent, is beyond his authority, and does not bind the principal.
2. A party dealing with the agent, with knowledge or means of knowledge that under such a power he is endorsing the name of his principal for his own benefit, is not entitled to recover from the principal.
3. The fact that the attorney, who was the drawer of the bill upon which he endorsed the name of his principal, held the bill at the time it was discounted by the holder, and that the proceeds were passed to his credit, are of themselves full proof that the attorney was acting for his own benefit, and not that of his principal.

This was an action of *assumpsit* in the Circuit court of Petersburg, brought by the Bank of Virginia against Littleberry E. Stainback, as endorser of three bills of exchange, each for five hundred pounds sterling, drawn by F. C. Stainback upon T. W. Clagett, of London, and protested for nonacceptance. The bills purport to be endorsed by Littleberry E. Stainback, by F. C. Stainback, his attorney. Two of them bear date the 6th, and the third the 7th of February 1843. This case presented the same questions as to the protest and notice as arose in the next preceding case, but they are not noticed by this court. The case turned upon questions arising out of the endorsement by the attorney.

On the trial of the cause, after the plaintiffs had introduced in evidence the three bills of exchange, the

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protests, and the evidence as to the dishonor of the bills and the notice., they introduced a power of attorney in the following terms :

“ Know all men by these presents, that I, Littleberry E. Stainback, of the town of Petersburg, state of Virginia, have made and appointed Francis C. Stainback, of the town of Petersburg, state of Virginia, my true and lawful agent and attorney, for me and in my name and behalf to make, or endorse my name on, any note negotiable and payable at the office of discount and deposit of the Bank of Virginia, in Petersburg; also to endorse my name on any bill of exchange negotiable at the office aforesaid, and to subscribe my name to any such bill or note, or to any endorsement thereof, or any acceptance of any such bill; also to draw in my name or sign and subscribe to any check payable and negotiable at the said office of discount and deposit in Petersburg as aforesaid; hereby ratifying, allowing and confirming all and every act that my said agent and attorney shall do in and about the premises. And I, the said Littleberry E. Stainback, for myself, my heirs, &c., do hereby covenant with the president, directors and company of the Bank of Virginia, and their successors, that this power of attorney shall continue in full force and virtue until due notice shall be given in writing to the cashier of their office in Petersburg of its revocation; and that all notices of the protests of any bill or note made, endorsed or accepted by me, shall be good and sufficient in law, if given to my attorney aforesaid in my absence from the said town of Petersburg, state of Virginia. In witness whereof, I have hereunto set my hand and seal this 19th day of March 1833.

L. E. STAINBACK. [Seal.]”

This power of attorney was deposited in the Bank of Virginia at Petersburg when it was executed, and

had remained there ever since, unrevoked, until after the bills of exchange on which the action is founded were discounted by that bank. On the 12th of February 1843 L. E. Stainback addressed a note to the cashier of the bank, directing him to deliver the power of attorney to F. C. Stainback; and on the next day F. C. Stainback, as the attorney of L. E. Stainback, by endorsement on this note, which was attached by wafers to the power, revoked it from that date.

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It was proved that F. C. Stainback was born on the 25th of February 1816; that at the date of the power of attorney the defendant was a merchant in Petersburg, and F. C. Stainback, who is his son, was a clerk in his store, and engaged in no business on his own account; that F. C. Stainback had never been engaged in any business on his own account until the partnership of L. E. Stainback, Son & Co. was formed, which commenced business March 5th, 1837; said firm consisting of the defendant, L. E. Stainback, F. C. Stainback and James Macfarland, who married a daughter of the defendant. That Macfarland died in the latter part of the year 1841, leaving the defendant and F. C. Stainback surviving him, the latter of whom had the sole charge of settling up the business of the firm. That the bills on which this suit is founded were received by the Bank of Virginia at Petersburg from F. C. Stainback, and their proceeds passed on the books of the bank to his credit; that two of the bills were lodged with the bank on the 6th, and so passed to his credit on the 7th of February 1843, which was the regular bill day at the bank, and the third bill was lodged with the bank on the 7th, and so passed to his credit on the 9th of the same month, which was a regular discount day at said bank. That at these dates F. C. Stainback was a merchant in Petersburg, and had been since about July 1842, in good credit, engaged in shipping produce and drawing bills. That

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the defendant had been engaged in no active business since the dissolution of the partnership of L. E. Stainback, Son & Co. ; had removed to his farm, which lies just beyond the corporation line of Petersburg, and was seldom in town ; though he was in February 1843 the owner of ships.

It was further proved by the cashier of the Bank of Virginia at Petersburg, that it was understood by him at the time said bills were negotiated, as a matter generally known at the time in Petersburg, that F. C. Stainback went to Charleston in January 1843 to buy cotton, and that he made large purchases, and that the cashier supposed and believed at the time that the said bills were drawn on shipments, but he did not know on what shipments, nor did he know for whom the purchases in Charleston had been made. That on the morning of the 7th day of February 1843, the account of F. C. Stainback in the Bank of Virginia at Petersburg was overdrawn, the balance against him being three thousand one hundred and ninety-three dollars and eight cents ; that his deposits and discounts on that day amounted to eight thousand five hundred and sixty-two dollars and sixty cents, and his checks to seven thousand nine hundred and eighty-nine dollars and thirty cents, leaving a balance of two thousand six hundred and nineteen dollars and seventy-eight cents against him on the morning of the 8th ; that his discounts and deposits amounted on the 8th to three thousand seven hundred and ninety-two dollars and twenty-eight cents, and his checks to six thousand nine hundred and ninety-nine dollars and forty-nine cents, leaving a balance of five thousand eight hundred and twenty-six dollars and ninety-nine cents against him on the morning of the 9th ; that his discounts and deposits on that day amounted to four thousand seven hundred and seventy-eight dollars and seventy-eight cents, and that no check of his was paid

or presented for payment on that day; and that his account continued to be overdrawn until the 16th of February 1843.

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It was further proved that F. C. Stainback was generally regarded as the agent of his father; that the transactions of L. E. Stainback, Son & Co. had been very large, and after the death of Macfarland, one of the partners, sometimes amounted to one hundred thousand dollars a month at the said bank. That after the death of Macfarland in 1841, about July 1842, F. C. Stainback was in the habit of signing and endorsing the name of the defendant on bills and notes negotiated at said bank, as it is endorsed on the bills in evidence in this cause; but that none of the bills so drawn or endorsed had been dishonored, and that none of the said notes had been taken up by the defendant. That P. C. Osborne, one of the endorsers on the bills on which this action is founded, is a son in law of the defendant, and resided in Petersburg. That from about the month of April 1842 the indebtedness of L. E. Stainback, Son & Co. to the plaintiffs on their accommodation was rapidly reduced, and F. C. Stainback frequently used his own checks, and funds apparently his own, to make payments and deposits for the benefit of that firm; and that F. C. Stainback frequently put his name on paper of L. E. Stainback, Son & Co. as last endorser, so that he might have the control of the proceeds of the discounts. That when the bills in evidence in this case were negotiated F. C. Stainback had on deposit to his credit at said bank notes and inland bills, considered good, to the amount of upwards of thirty thousand dollars, running to maturity, which were withdrawn by him on or about the 13th of February 1843.

It was also proved by the cashier of the bank at Petersburg, that he was present at the meeting of the board of directors when the bills in this case were

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negotiated, and that he had no knowledge that the proceeds of said bills were not to be used for the benefit of the defendant; that several foreign bills drawn by F. C. Stainback after the revocation of the power of attorney were endorsed by the defendant with his own hand and by P. C. Osborne, and were negotiated by the Bank of Virginia at Petersburg, and the proceeds passed to the credit of F. C. Stainback, one of them, for one thousand pounds, being drawn on T. W. Clagett, of London; and that in February 1843 there was an account in the name of L. E. Stainback, Son & Co. on the books of said bank, which was, however, merely a continuation of their accommodation at the bank, which was about the 1st of February 1843 reduced, by F. C. Stainback's check for six hundred dollars, to about five thousand dollars.

The said cashier also proved that he was authorized by the board of directors, and that it is not unusual, where large dealers with the bank, especially dealers who are drawing foreign bills, and persons having large deposits of bills and notes to their credit running to maturity, to permit them to overdraw their accounts for a few days in the course of business, where he has reason to believe that a discount will be obtained of the bills or notes lodged with him on next discount day. That the overdrawing aforesaid of F. C. Stainback was known to the said cashier, but was not made known by him, nor, as far as he knows, in any other way, at the time said bills were discounted, to the board of directors, by whom they were discounted.

Upon this evidence the defendant moved the court to instruct the jury as follows:

1st. If you believe from the evidence that the bills on which this suit is brought were received by the plaintiffs from F. C. Stainback, and discounted by them for his accommodation, and that the plaintiffs knew, or had reason to believe, that the money was

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obtained by the said F. C. Stainback for his individual benefit, then the plaintiffs are not entitled to recover against the defendant by force of the power of attorney given in evidence by them. But if the jury believe that the plaintiffs received the said bills from the said F. C. Stainback, and passed the proceeds to his credit, then it was incumbent on them to satisfy themselves that the money was obtained for the use and benefit of the defendant.

2d. If you believe from the evidence that the power of attorney given in evidence in this case was made by the defendant whilst a merchant in Petersburg, and F. C. Stainback, his son, was under age and a clerk in his store, and engaged in no business on his own account, and that the object of the defendant in making the said power was to authorize his said son to transact his business at the Bank of Virginia at Petersburg, and that this was known to the plaintiffs; and if you believe that the bills on which this suit is founded were not endorsed by the said F. C. Stainback in the course of transacting and attending to the business of the defendant at the said bank, but for the said F. C. Stainback's own use and accommodation, and that the same were discounted by the plaintiffs for the accommodation of said F. C. Stainback, then the plaintiffs are not entitled to recover against the defendant by force of said power of attorney.

3d. If you believe from the evidence that the power of attorney given in evidence in this cause was made by the defendant whilst a merchant in Petersburg, and whilst the said F. C. Stainback, his son, was a clerk in his store and under age, and engaged in no business on his own account, and that the object of the said defendant in making the said power was to authorize and empower his said son to sign his name to bills, notes, &c., in the business of the said defendant, and not to authorize the said F. C. Stainback to use the name of

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the defendant for his (the said F. C. Stainback's) own benefit, and that this was known to the plaintiffs; and if you believe that the bills on which this suit is brought were not endorsed by the said F. C. Stainback in the business or for the benefit of the defendant, but for the said F. C. Stainback's own use and accommodation, and that the same were discounted by the plaintiffs for the accommodation of said F. C. Stainback, then the said plaintiffs are not entitled to recover against the said defendant by force of said power of attorney.

The court refused to give these instructions, or any of them; and instructed the jury as follows :

That the power of attorney offered in evidence in this cause, from the defendant to his son, F. C. Stainback, to endorse bills, notes, &c., for the defendant at the branch Bank of Virginia in Petersburg, gave the said F. C. Stainback no power to endorse bills or notes for his own benefit, or that of any other person except the defendant himself; that the endorsements made upon the bills exhibited in evidence in this cause, in the manner in which the same are made, are not inconsistent with the power of the said F. C. Stainback to endorse bills and notes for the benefit of the defendant, but within the scope of his authority to endorse bills for that purpose. If, therefore, the jury shall believe, from the evidence in the cause, that the plaintiffs discounted said bills without notice of, or just cause to suspect, any intended fraud or misapplication of the proceeds thereof from the use and benefit of the principal, that then the defendant is bound by said endorsements; and any subsequent misapplication of the proceeds of said bills (if there were any) will not defeat the right of the plaintiffs to recover of the defendant.

The defendant excepted to the opinion of the court. There was a verdict for the plaintiffs, and a motion

by the defendant for a new trial, which was overruled, and judgment rendered for the plaintiffs; when the defendant again excepted, and applied to this court for a *supersedeas*, which was awarded.

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Joynes and Patton, for the appellant.

D. May and Stanard, for the appellees.

SAMUELS, *J.* The several endorsements on which this suit is founded were made under color of authority conferred by the power of attorney, which was the subject of consideration in the case of *Stainback v. Read & Co.*, recently decided in this court. This case, like the case above mentioned, turns upon the questions :

1st. Whether the endorsements were made in the proper exercise of the agent's authority.

2d. If not, whether there is anything in the dealing between the bank and the agent which should bind the principal, notwithstanding the agent's want of authority.

After the evidence had been heard on the trial in the court below, three several instructions were moved for by the defendant's counsel, predicated upon portions of the evidence, tending to show that the agent, in making the endorsements, was not acting in the business of the principal, but for the agent's own benefit, and praying the court to instruct the jury, if they believed this fact, they should find for the defendant. These instructions were refused by the court; and therein the court erred. If the agent did in fact endorse the name of his principal on the bills for the agent's own accommodation, he exceeded his authority, and the endorsements standing alone do not bind the principal.

2d. As to the second question : In the case above mentioned it was declared that, under certain circum-

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stances therein mentioned, a principal might be bound by the act of the agent, although the agent may have exceeded his authority. This modification of the general rule in regard to a power to endorse, &c., applies in the case of an innocent holder for value, who has become such by the act of an agent apparently within the scope of his authority. The court, in the absence of all proof tending to prove the fact, should not have submitted it to the jury to find whether the bank was an innocent holder. So far from showing that the bank might have been deceived, and was probably deceived, by the agent, the evidence tends strongly to prove the reverse. In legal intendment the bank knew the limits of the agent's written authority; they had that authority in their own keeping; the bills were drawn by the agent in his own name and behalf; the name of the principal, who was the payee, was endorsed by the agent; and yet the bills are found in the hands of the drawer, and offered by him for discount for his own benefit, and they are discounted accordingly, and the proceeds applied to the credit of the agent's own individual account. At the time the proceeds of the bills were so applied to the agent's credit he was indebted to the bank in a large amount; and thus his debt was paid, so far as the proceeds of the bills extended. In every stage of the proceeding with which the bank was connected, it was perfectly apparent that the business of the agent, and not of the principal, was to be promoted.

It will not do to say that the agent might, by a certain disposition of the proceeds, have indemnified his principal, and that the bank could not know that he would not do so. The answer is obvious, that the proceeds of the bills were at once applied to his own benefit on the books of the bank, with its full knowledge and consent. If the possibility that an agent may indemnify his principal against abuse of power

may be relied on to bind the principal, the practical and beneficial effects of limitations in powers will be destroyed; for in every case the agent may possibly indemnify his principal against such abuse.

The remaining questions, growing out of the protests, and the mode of transmitting the notices of dishonor, are considered in another case between the same parties; and I refer to what is there said as expressing my opinions on those questions.

I am of opinion to reverse the judgment, and remand the case for a new trial to be had in conformity with the principles herein declared, if on such new trial the proof shall be the same in substance as on the former trial.

ALLEN and DANIEL, *Js.* concurred.

MONCURE and LEE, *Js.* dissented.

The judgment was as follows:

It seems to the court here, that the power of attorney from L. E. Stainback to F. C. Stainback, given in evidence at the trial, as between the principal and agent, gave the attorney no authority to endorse the bills given in evidence, with the name of L. E. Stainback, for the accommodation of the attorney; and that parties dealing with the attorney, and having the means of knowing that he, in endorsing the name of the principal and obtaining a discount thereon, did so for the accommodation of the agent and not of the principal, cannot recover of the principal. It further seems to the court, that the facts appearing in the record, that the attorney, who was also the drawer, held the bills at the time they were offered for discount and discounted by the defendants in error, and that the proceeds were passed to the credit of the attorney, the drawer as aforesaid, are of themselves full proof

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that the attorney was acting for his own benefit and not that of his principal; all which was known to the defendants. It therefore seems to the court that the Circuit court erred in refusing to give in substance the three several instructions moved for by the plaintiff, and in giving that which was given in lieu thereof.

Therefore, it is considered by the court that the judgment aforesaid be reversed and annulled, and that the defendants pay to the plaintiff his costs expended in this court; that the verdict of the jury be set aside, and the cause remanded, with instructions that if upon any future trial the evidence shall be in substance the same as at the former trial, and if the defendant in the court below shall ask it, the court shall instruct the jury in accordance with the opinion of this court, as herein declared.

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1. A power of attorney given to an agent to act in the name and on behalf of his principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal.
2. A power of attorney to draw, endorse and accept bills, and to make and endorse notes, negotiable at a particular bank, in the name of the principal, does not authorize the attorney to draw a bill in the joint names of himself and his principal.
3. Such a power does not authorize the attorney to draw a bill in the name of his principal upon a person having no funds of the principal in his hands. And if such a bill is accepted and paid by the drawee for the accommodation of the drawer, there is no implied obligation of the principal to repay him.
4. Such a power does not authorize the attorney to draw a bill in the name of his principal for the benefit of the attorney; and a party dealing with the attorney, and having the means of knowing that the agent was exceeding his powers in thus drawing the bill for his own benefit, cannot recover of the principal.

This was an action of *assumpsit* in the Circuit court of Petersburg, brought by C. C. Read & Co. against Littleberry E. Stainback. Upon the trial the plaintiffs introduced in evidence a bill of exchange, which bore date the 14th of December 1842, and was directed to them, whereby they were requested to pay to P. C. & J. D. Osborne & Co. one thousand nine hundred and sixty-nine dollars and forty-two cents. The bill was signed by L. E. Stainback, by F. C. Stainback, attorney, and by F. C. Stainback, and was endorsed by the payees and F. Stainback; and was paid by the plaintiffs, who charged the amount on their books to F. C. Stainback and the defendant; neither of whom had, at the date of the bill, any funds in the hands of the plaintiffs.

Defendant
Plaintiff
Verdict
Jury
Court

The plaintiffs introduced in evidence the power of attorney from L. E. Stainback to F. C. Stainback, and the bill of exchange. They also offered evidence, going back to some time about the beginning of 1842, the defendant and F. C. Stainback and another, who died in 1841, were in business in Petersburg as merchants, under the name of L. E. Stainback, Son & Co. That the defendant is far advanced in life, attended to no business, and that F. C. Stainback had the management and settlement of the business of L. E. Stainback, Son & Company to the time of his failure in 1843. That L. E. Stainback, Son & Co. and also F. C. Stainback had an account at the Bank of Virginia in Petersburg in December 1842, and previously, and that L. E. Stainback, Son & Co. were indebted to that bank until 1843. That on the 15th of December 1842 the bill aforesaid was discounted by said bank, and the proceeds passed to the individual credit of F. C. Stainback, the draft not then having been accepted by the plaintiffs. That in managing the bank business of L. E. Stainback, Son & Co. F. C. Stainback frequently endorsed notes and bills, last, that he might control the proceeds.

The plaintiffs also introduced two letters, both of them in the handwriting of F. C. Stainback, and addressed to them. One bears date September 21st, 1842, and is signed "L. E. Stainback, Son & Co." The only part of it having any bearing on this case is as follows:

"I enclose some paper, for which please send me your notes, payable at Farmville, viz:

My note dated 2d September, at 90 days,

favor L. E. S.	-	-	-	-	-	1,619 48
Do. do. 7th do. do.	-	-	-	-	-	1,941 67

\$3,561 15

For which be pleased to send me your notes in favor

of L. E. Stainback, Son & Co., dated 1st September, at 90 days, for \$1,618.38, and dated 8th September, at 90 days, for \$1,942.77, which will balance. You can use the notes if you wish.

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"L. E. Stainback, Son & Co. have \$15,000 to pay on 4th of next month, and I wish to provide myself with paper in time. Your notes you will make payable in Farmville."

The second letter bears date December 15th, 1842, and is signed "F. C. Stainback." In it he says, "I have yours of 10th, handing your check for \$1,000. Your draft fell due to-day, not on 16th, and I had to alter the date to 15th. I would not have used it if I could have avoided it."

"P. S. The draft of \$1,740.92 is right. We had another discounted to-day for about \$1,100. Will duly take care of them."

The plaintiffs also introduced in evidence certain bills or drafts, one of which was endorsed by L. E. Stainback, by F. C. Stainback attorney, F. C. Stainback, and L. E. Stainback, Son & Co.; and another was signed as the bill on which this action is founded is signed.

The defendant offered evidence to prove that at the date of the power of attorney aforesaid the defendant was engaged in mercantile business in his own name in Petersburg, F. C. Stainback being a clerk in the defendant's house; and that F. C. Stainback was at that time under age, and engaged in no business on his own account; and that the firm of L. E. Stainback, Son & Co. was formed about 1836 or 1837.

The evidence being through, the defendant moved the court to instruct the jury as follows:

1st. That under the power of attorney given in evidence in this cause, F. C. Stainback had no authority to draw the bill on the plaintiffs, the payment of which

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constitutes the foundation of this action ; and that the drawing of such bill on the plaintiffs, and the payment thereof by them, did not authorize the said plaintiffs to maintain this action against him.

2d. That if they believe from the evidence, that the bill, the payment of which by the plaintiffs constitutes the foundation of this action, was drawn by F. C. Stainback for his own benefit, and the proceeds thereof went to his own use, that it was not authorized by the power of attorney in evidence in this cause, and that it was the duty of all persons dealing with the said F. C. Stainback as attorney to notice the limitations of his authority, as the same was conferred by the said power, and that he could only bind his principal in such cases and upon such bills as were included in said authority.

3d. That the power of attorney given in evidence in this cause gave no authority to F. C. Stainback to bind the defendant, by drawing or endorsing bills, &c., for the benefit of F. C. Stainback, nor unless the same were drawn or endorsed for the benefit and in the business of the defendant.

4th. That if the jury believe from all the evidence in the cause, that the object of the defendant in executing the power of attorney in evidence in this cause was to enable and authorize his son, F. C. Stainback, the attorney, to attend to and transact the bank business of the defendant at the Virginia Bank in Petersburg, the defendant being then a merchant in Petersburg, and the said F. C. Stainback being under age, and that the bill, the payment of which by the plaintiffs is the foundation of this suit, was not drawn by the said attorney in the course of attending to and transacting the bank business of the defendant at said bank, but for his own use and accommodation, then the said attorney had no power to bind the defendant.

by the drawing of the said bill, so as to enable the plaintiffs, on payment thereof, to recover the amount from the defendant.

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The court refused to give the first and fourth instruction, and gave the second and third; but qualified the same by further instructing the jury, that the agent, F. C. Stainback, had the power, under the letter of attorney made evidence in the cause, to draw the bill on which this suit is founded, and subscribe the name of his principal (L. E. Stainback) thereto, in the manner in which it is done; and that if the jury shall believe that the plaintiffs accepted the same, and paid it at maturity, without notice of, or just cause to suspect, any intended fraud or misapplication of the proceeds thereof from the use or benefit of the principal, that then they ought to find for the plaintiffs, though they may believe it was an accommodation acceptance. And further, that if the jury shall believe that no fraud or collusion with the agent is chargeable on the plaintiffs, then the fact that the said agent executed the bill in the name of his principal, L. E. Stainback, designating himself as attorney, is equivalent to a declaration on his part that he was acting in the business and for the benefit of his principal; and that any misapplication of the proceeds by the agent after they came to his hands (if there was any) would not defeat the plaintiffs' recovery.

To the opinion of the court refusing the first and fourth instructions, and instructing the jury as aforesaid, the defendant excepted. There was a verdict and judgment for the plaintiffs; and thereupon the defendant applied to this court for a *supersedeas*, which was awarded.

Joynes and *Patton*, for the appellant.

D. May and *Stanard*, for the appellees.

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SAMUELS, J. A proper analysis of this case will show that it turns upon two questions :

First. Whether F. C. Stainback had the authority of L. E. Stainback, his principal, to draw the bill which is part of the foundation of this suit, or to subject his principal to an action on a collateral contract in regard thereto ?

Second. If he had no such authority, is L. E. Stainback still liable for the act of the agent, because of anything in the dealing between the agent and the plaintiffs ?

It may be laid down as a rule of law, sanctioned alike by reason and authority, that a power of attorney given to an agent, to act in the name and on behalf of his principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate, individual business of the principal. See Story on Agency, from § 57 to § 143 ; *Atwood v. Munnings*, 7 Barn. & Cress. 278 ; *North River Bank v. Aymar*, 3 Hill's N. Y. R. 262 ; *Stainer v. Tysen*, 3 Hill's N. Y. R. 262 ; *Heves v. Doddridge*, 1 Rob. R. 143.

It is equally well settled that a party dealing with an agent, acting under a written authority, must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him ; and he must, at his peril, observe that the act done by the agent is legally identical with the act authorized by the power. See cases above cited ; also 1 American Leading Cases 392, in notes.

These rules of law, applied to the facts of the case, are decisive of the first question. The bill was not drawn in the business of L. E. Stainback, but in that of F. C. Stainback exclusively. It was not identical with a bill drawn in the separate name of L. E. Stainback. A joint bill imposes a joint liability on the

drawers in case it be not honored. In case of loss in the business in which the bill is drawn, both parties are bound; and in case one of the drawers be insolvent and the other solvent, as in this case, the whole loss must fall on the solvent party. If, however, a profit be made, it must be divided between those jointly concerned. A contract such as this is widely different from one in which the party liable for a loss, if one occur, is solely entitled to the profit, if one result.

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Again: The power, in any event, must be held to authorize the agent to draw such bills only as L. E. Stainback might himself have rightfully drawn. In the case before us neither L. E. Stainback alone, or L. E. and F. C. Stainback jointly, had any right to draw the bill in question, having no funds in the hands of the drawees; and having, at the time, no other reason to suppose it would be accepted. The drawer of a bill, when he negotiates it, is to be understood as affirming that he has the right to draw. In the case before us L. E. Stainback is made to falsely affirm such right; to commit a fraud by means of the falsehood; and all this under color of the authority conferred by him. Under certain circumstances a principal may be bound by the act of his attorney going beyond his power, yet he can be so bound only to an innocent holder for value. Read & Co. are not holders at all; they knew perfectly well that L. E. Stainback, either solely or jointly with another, had no right to draw on them; that a power to draw bills rightfully would not extend to their house, in the then state of business relations between them and the drawers, or either of them.

The letter of attorney authorized the agent to do certain specified acts, including the drawing of bills. This, as already stated, is to be construed as applying to the rightful drawing of bills in the business of the

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principal. Within these limits the agent had authority to pledge the credit of his principal, and subject him to the consequent liability. Yet in the case before us the defendant is sued not upon a direct undertaking as drawer, nor upon a liability incident to his position on the bill; he is sued upon an alleged contract to transpose the position of the drawers and acceptors, to make the drawers liable to the acceptors: And all this is said to be implied in the drawing the bill under the circumstances existing at the time. It cannot be held that an agent may, by implied contract, bind his principal beyond those limits within which he might bind him by express contract; nor can it be held that a power to draw a bill in itself gives the further power to make another original and express contract to indemnify the acceptor against his acceptance. If the attorney could not make an express contract of indemnity, it is impossible to suppose that it can be implied from his drawing the bill.

The second question has, to some extent, been anticipated in considering the first. There are, however, certain considerations peculiar to this branch of the case which require some notice. It is well settled that although an agent may in fact exceed his power, yet if he apparently keep within its limits, and deal with innocent parties for value, the principal will be bound. *Mann v. King*, 6 Munf. 428; *North River Bank v. Aymar*, 3 Hill's N. Y. R. 262. It is but just that the principal should suffer the consequences of his own misplaced confidence, rather than they should fall on innocent parties. This rule of law, however well established, can afford no aid to Read & Co. upon the facts of this case. They dealt with an agent acting under a power of attorney, and, as already said, must be regarded as dealing with that power before them. They were bound, at their peril, to notice the limits prescribed therein, either by its own terms, or

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by construction of law. With this knowledge, they nevertheless make a contract, which is not one of those specified in the power; but an original contract to subject the drawers to a liability not incident to their position on the paper. They accepted the bill, having no funds of the drawers; they knew that their acceptance would make them liable to any subsequent holder for value; they relied upon the undertaking of F. C. Stainback for indemnity; this undertaking is contained in the letter dated December 15th, 1842, the day the bill was discounted, advising the drawees of the bill and its discount, and promising "to take care of it"; obviously meaning thereby to provide funds for its payment at maturity. This undertaking is contained in a letter from F. C. Stainback to Read & Co., given in evidence upon the trial. The letter is signed by F. C. Stainback with his own name only; is wholly upon his own business with them; and must be held to be an express guarantee by F. C. Stainback alone. This excludes all possibility of an implied guarantee by L. E. Stainback, either joint or several.

The law, as here declared, required that the first and fourth instructions should have been given; and seeing that, by necessary legal intendment, Read & Co. did know the limits of the attorney's power, and that in making the contract sued on he was exceeding his authority, there was no foundation in the facts of the case for the qualification with which the second and third instructions were given. The court therefore erred in annexing such qualification.

I am of opinion to reverse the judgment of the Circuit court, and remand the cause for a new trial, with directions to give the four instructions as moved for, if the evidence on the new trial shall be substantially the same as on the former trial and if the instructions shall be again asked for.

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ALLEN and DANIEL, *Js.* concurred.

MONCURE and LEE, *Js.* dissented.

The judgment was as follows :

It seems to the court here, that the power of attorney from Littleberry E. Stainback to F. C. Stainback, given in evidence on the trial in the court below, did not give authority to F. C. Stainback to draw the bill given in evidence, binding said L. E. Stainback as a joint drawer with F. C. Stainback ; and that the Circuit court erred in refusing to give the first instruction moved for by the plaintiff in error.

It further seems to the court here, that the power of attorney, as between the principal and agent, gave no authority to the agent to draw the bill aforesaid for the accommodation of the agent ; and that parties dealing with the agent, and having the means of knowing that the agent was exceeding his power in thus drawing the bill for his own benefit, cannot recover of the principal.

It further seems to the court that the facts, that F. C. Stainback held the bill and had it discounted for his own benefit ; that he wrote the letter of December 15th, 1842, addressed to the defendants ; that they accepted, after receiving that letter, and charged their acceptance to F. C. Stainback, if believed by the jury, taken in connection with the written evidence, were sufficient to show that the defendants had the means of knowing that F. C. Stainback, the agent, in procuring the acceptance of defendants, was procuring it for his own accommodation and not that of his principal ; and that the principal was not bound : that the court below should have so instructed the jury, and that it erred on plaintiff's second motion to instruct.

It further seems to the court here, that the court

below erred in its action on the plaintiff's third and fourth motions to instruct; that it should have given the instruction above stated as proper to be given on the second motion to instruct.

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Therefore, it is considered by the court, that the said judgment be reversed and annulled; that the plaintiff recover of the defendants his costs in this court expended; that the verdict of the jury be set aside, and the cause remanded for a new trial to be had therein; upon which trial, if the evidence shall be the same in substance as that at the former trial, the Circuit court shall conform its action to the principles hereby declared.

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1. The offence of a free negro in coming into the state and remaining therein, in violation of the 28th and 29th sections of chapter 198 of the Code of Virginia, is a misdemeanor, for which he is liable to be prosecuted and punished in the manner provided in said 28th section.
2. Upon conviction of such a misdemeanor the party is entitled, as of right, under the 15th section of chapter 213 of the Code, to an appeal from the justice's decision to the court of the county or corporation in which his conviction was had: And it is the duty of the justice to allow the appeal, if duly applied for.
3. If in such case the appeal is duly applied for and refused by the justice, the party may have relief by *mandamus* from the Circuit court.
4. If the Circuit court refuses to issue a *mandamus* in such a case, the party may apply to the Supreme court of appeals for a *supersedeas* or writ of error, and have the action of the Circuit court reviewed and corrected by that court.

William W. Morris, a free negro, applied by petition, verified by his affidavit, to the Circuit court of the city of Richmond, for a *mandamus* to the mayor of Richmond, to compel that officer to allow to the petitioner an appeal from a judgment pronounced against him. In his petition he stated that on the 1st day of May 1854 he was arraigned before Joseph Mayo, the mayor of the city of Richmond, for remaining in the commonwealth contrary to law, upon the allegation that he had forfeited his right to stay therein by reason of his having once gone beyond its limits, under the 28th and 29th sections of ch. 198 of the Code of Virginia. That upon this charge he was tried by the said mayor, and was required to give bond, in the penalty of five hundred dollars, that he would leave

the state within ten days. From this decision he appealed to the Hustings court, and offered any security which might be required of him. But the mayor refused to allow the appeal, and exacted from him the bond aforesaid. He insisted that his right to appeal from the decision of the mayor was absolute. That by § 1 of ch. 199 of the Code, the offence of which he had been convicted is a misdemeanor; and by § 15 of ch. 212, the right of appeal from any such judgment is made absolute. He therefore prayed that the court would award a *mandamus* to compel the mayor to allow to him an appeal to the Hustings court.

The Circuit court refused the writ; and thereupon Morris applied to this court for a *supersedeas* to the judgment of the court, which was allowed.

Crump, for the petitioner.

LEE, J. The plaintiff in error, who was a free negro, was charged before the mayor of the city of Richmond with remaining in the commonwealth contrary to law, after having forfeited his right to return to the state, or remain therein, by going to a nonslaveholding state. Upon this charge he was tried, and, being adjudged to have violated the law in this respect, he was required to give bond in the penalty of five hundred dollars, with condition that he would leave the state within ten days. From this sentence he prayed an appeal to the Hustings court, and offered to give any security that might be required; but the mayor, not thinking him entitled to an appeal in such a case, refused to grant it. He then presented a petition to the Circuit court of the city of Richmond, setting out the facts, and verified by affidavit, praying a *mandamus* to compel the mayor to grant him an appeal; but that court, upon consideration of the matter, refused to grant the writ prayed for; and he then

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presented a petition to this court, praying a *supersedeas* to the order of the Circuit court refusing the *mandamus*, which was allowed.

I think there can be no question as to the power of this court to review the action of a Circuit court in refusing to award a *mandamus* upon an appeal from or writ of error or *supersedeas* to the order refusing the same. The order is final, and in a case involving a civil right, not a matter of controversy merely pecuniary, and the case is thus within the general terms of the law providing the appellate jurisdiction; and the 9th and 10th sections of the act of June 5th, 1852, (Sess. Acts 1852, p. 53,) although they do not *in totidem verbis* declare that an appeal, &c., shall lie to the Court of appeals from the judgment of a Circuit court in a case of *mandamus*, yet they do so in effect; for they provide that when a petition for an appeal, &c., in such a case shall be presented, the certificate of counsel as to the propriety of reviewing the decision may be counsel or attorney of the Supreme court of appeals or a District court; and if the appeal, &c., be allowed, that the case shall be docketed in the Supreme court, unless the petitioner ask that it be docketed in a District court; in which case it may be docketed in such last named court, subject to be transferred to the Supreme court of appeals in the manner provided in the act. The review of an order refusing a *mandamus* is in entire conformity with the long settled previous practice of this court in similar cases. In *Mayo v. Clark*, 2 Call 276, a District court had refused to grant a *supersedeas* to an order of a County court concerning a road. The Court of appeals refused to grant a *mandamus* to compel the District court to grant the *supersedeas*, but did grant a *supersedeas* to the order of the District court refusing it. In another case a Superior court of law had refused to grant a *mandamus* to compel a County court, in which an action

had been brought against a party claiming to be a lieutenant in the navy of the United States and a citizen of Pennsylvania, to remove the case into the United States court, pursuant to the act of congress on that subject. The Court of appeals reversed the order of the Circuit court refusing the *mandamus*, and proceeded to award it. Several other cases may be found in which the Court of appeals has allowed writs of *supersedeas* to orders of inferior courts refusing to grant writs of *mandamus*. *Dawson v. Thruston*, 2 Hen. & Munf. 132; *Dew v. Judges of Sweet Springs District Court*, 3 Hen. & Munf. 1; *Manns v. Givens*, 7 Leigh 689.

The 28th and 29th sections of chapter 198 of the Code, p. 745, prohibiting the migration of free negroes into this commonwealth, or the return of one who has once gone to a nonslaveholding state, contain provisions of a highly penal character, to be enforced in the manner therein prescribed. They cannot be called "police regulations" in any other sense than one affecting the state at large. They cannot properly be so called in the usual and restricted sense of those terms, which applies them to the ordinances enacted by the local authorities of a town or city for its internal government, and the preservation of good order within its limits. Any violation of these provisions constitutes an offence against the laws of the commonwealth, for which the party is liable to be arrested and summarily dealt with as the act provides; and it cannot be distinguished from a breach of any other penal enactment, embracing the whole state, to be found in the Code. It is true that in this case no other sentence has been pronounced than that the party must give the bond to leave the state, and no order for stripes has been yet made; and if the bond be given, the party is no longer liable to the stripes. But he is under arrest, and, if the bond be not given, the order for the stripes may be made at any time, and

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may be repeated from time to time. If the bond be given, the penalty is forfeited if he fail to leave the state within the ten days, or if, having left it, he should afterwards return within its limits. And in an action upon the bond to recover the penalty, he cannot defend himself by showing that he was not liable to give such a bond. That is concluded by the judgment of the mayor, whose sentence is accordingly the conviction of the party of the offence charged.

A violation of the provisions of these sections being thus an offence against the laws of the commonwealth, it falls of course within the class of misdemeanors, under the first section of ch. 199, p. 750, which declares all offences to be either felonies or misdemeanors; and under the 15th section of ch. 212, p. 788, a negro convicted of a misdemeanor by a justice is entitled to appeal from the decision to the County or Corporation court; and it is the duty of the justice to grant such appeal, if the same be applied for.

The act has made no provision for the case of a refusal by the justice to grant an appeal, where the party is legally entitled to demand it; but he does not thereby lose the benefit of it, though he of course must resort to such remedy as the common law affords. That the *mandamus* is the rightful remedy, I have no doubt. This lies where there is a distinct legal right, and no other means of asserting it; and the case under consideration is precisely in that category. Here the party has a plain, unquestionable right to appeal from the sentence of the mayor, and that officer has no discretion in the matter. Unless his right to the appeal be asserted, there will be a failure of justice; and there is no mode in which it can be asserted save by a resort to the general power possessed by the Circuit court to "oblige all inferior courts and magistrates to execute that justice to which a party is entitled, and which they are enjoined to do by law, especially if it

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be enjoined by statute." That a *mandamus* will lie from the Circuit court to the justices of the County court, both as members of the court and individually *in pais*, is shown by numerous cases. *Commonwealth v. Justices of Fairfax*, 2 Va. Cas. 9; *Dawson v. Thruston*, 2 Hen. & Munf. 132; *Brander v. Chesterfield Justices*, 5 Call 548; *Brown v. Crippen*, 4 Hen. and Munf. 173; *Harrison v. Justices of Norfolk*, 2 Leigh 764; *Manns v. Givens*, 7 Leigh 689.

I think, therefore, the Circuit court erred in wholly refusing the prayer of the petition, and that it should have awarded a rule or a *mandamus nisi*, and, upon the return thereof, should have proceeded to investigate the facts of the case, and if found substantially as stated in the petition, should have awarded a peremptory *mandamus*.

I am of opinion to reverse the judgment of the Circuit court, but without costs; the mayor not having been summoned or otherwise made a party in the Circuit court, and regarding the proceeding hitherto as *ex parte* merely; and to remand the cause to the Circuit court, with directions to proceed in the manner above indicated.

The other judges concurred in the opinion of Lee, J.

The following is the judgment of the court:

The court is of opinion, that it is competent for this court to review the order of the Circuit court refusing said writ of *mandamus*, upon a writ of error or *supersedeas*; and if found erroneous, to reverse the same, and make such further order in the premises as shall be right and proper.

And the court is further of opinion, that the offence of a free negro in coming into this state and remaining therein, in violation of the 28th and 29th sections

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of ch. 198 of the Code of Virginia, is a misdemeanor, for which he is liable to be prosecuted and punished in the manner provided by said 28th section.

And the court is further of opinion, that upon conviction of such a misdemeanor, the party is entitled, as of right, under the 15th section of ch. 213 of said Code, to an appeal to the court of the county or corporation in which such conviction was had; and that in the present case it was the duty of the said mayor to have allowed such appeal, if duly applied for, as alleged in the plaintiff's petition to the said Circuit court.

And the court is further of opinion, that such appeal having been duly applied for and erroneously denied by said mayor, according to the allegations and suggestions of the said petition, the petitioner had no other legal means to assert his right to the same save by *mandamus*, and that such writ of *mandamus* was the rightful remedy to be resorted to in the premises.

And the court is further of opinion, that the said Circuit court had full authority and jurisdiction to entertain said application, and to award a *mandamus nisi* upon the filing of said petition; and upon due return thereof, if the facts of the case were, on proper investigation, found to be substantially as alleged in said petition, it was the duty of the said Circuit court to award a peremptory *mandamus*.

Wherefore the court is of opinion, that the order of the said court, wholly denying the prayer of said petition, is erroneous.

Therefore, it is considered by the court, that the said order be reversed and annulled, but without costs; the court being of opinion that the said mayor not having been summoned or otherwise made a party to the proceeding in the Circuit court, the proceeding in this court is to be regarded as in the nature of an *ex parte* proceeding on behalf of the petitioner, in

which the said mayor is no party nor liable for costs. And it is further ordered, that the cause be remanded to the said Circuit court, with directions to award a writ of *mandamus nisi* in the matter of said petition, and, upon due return thereof, to take such further proceedings in the cause as justice and the rules of law shall require. Which is ordered to be certified to the said Circuit court.

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JUDGMENT REVERSED.

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FITZHUGH'S *ex'or* v. G. F. FITZHUGH.1854.
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May 27th.

- 1 A personal representative cannot be sued as such for services rendered or goods furnished to his testator's or intestate's estate since his death.
2. It seems that an action will not lie against the personal representative as such for the funeral expenses of his testator or intestate.
3. In some cases where money has been paid for a deceased person, there an action for money paid will lie against the personal representative as such: As where money has been paid by a joint surety.
4. Where the demand made in all the counts in a declaration are such that an action cannot in any case be maintained upon them against the personal representative as such, the description of him as such may be considered as mere surplusage, and the judgment may be against him personally.
5. But if the demand set out in any one of the counts may possibly be maintained against the personal representative as such, then the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative character, it must fail.
6. An exception to an opinion of the court, refusing an instruction asked, does not state the facts of the case so as to show its relevancy. The appellate court will not undertake to decide whether the court did right or wrong in refusing the instruction.
7. A demurrer to a declaration having been overruled in the court below, and there being a judgment for the plaintiff, upon appeal the judgment is reversed and the demurrer sustained. The cause will be sent back, with leave to the plaintiff to amend his declaration.

This was an action of *assumpsit* in the Circuit court of Fauquier county, brought by George F. Fitzhugh against Henry Fitzhugh and Berkeley Ward, executors of Thomas Fitzhugh deceased. The writ abated as to Henry Fitzhugh by the return of "no inhabitant."

The declaration contained three counts. The first count was for medicine and other necessities, feed for horses, and board of negroes, furnished by plaintiff to defendants, as executors as aforesaid, at their special instance and request. The second count was for attendance upon the slaves of their testator's estate, and work and labor done and performed by plaintiff for and about the said slaves, &c., which attendance, work and labor, &c., were done, performed and rendered to defendants as executors as aforesaid, at their special instance and request. The third count was for money paid, laid out and expended by plaintiff for the use of the defendants as executors as aforesaid, at their special instance and request.

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The defendant demurred generally to the declaration; but the court overruled the demurrer. The defendant also pleaded *non assumpsit*, and *non assumpsit* within five years. And upon the trial he moved the court to instruct the jury, that unless they believe from the evidence that the charges and items mentioned in the bill of particulars in this case were furnished and rendered by the plaintiff at the instance and request of the defendant, they must find for the defendant. This instruction the court refused to give, and the defendant excepted; but the bill of exceptions does not set out any of the evidence, so as to show the relevancy of the instruction asked. There was a verdict and judgment for the plaintiff: And the defendant thereupon applied to this court for a *superse-deas*, which was awarded.

Patton, for the appellant.

Morson, for the appellee.

DANIEL, J. It seems to be well established as a general principle, that contracts made with an executor or administrator are personal, and do not bind the

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estate of the testator or intestate. The representative has no power to charge the assets in his hands by contracts originating with himself; nor can any other person reach the assets for claims originating since the death of the decedent, by suit against the representative as such. For such contracts and claims the remedy is against the executor or administrator in his private capacity: Whilst, on the other hand, for the contracts of the decedent, the representative is bound, not personally, but in his representative capacity. *Jennings v. Newman*, 4 T. R. 347; *Sumner v. Williams*, 8 Mass. R. 162, 199.

It is also equally as well settled that promises which charge a man as executor cannot be joined with those which charge him personally: Because the judgment in the one case would be *de bonis propriis*, and in the other *de bonis testatoris*. 2 Saund. R. 117 e, note; *Epes' adm'r v. Dudley*, 5 Rand. 437.

The declaration contains three counts. The charges exhibited by the two first have all originated since the death of the testator, and, unless they can be excepted from the general rule, they lie not against the executor as such, but against him personally. The counsel for the appellee argues that they may be so excepted; that they are of a nature entitling them to stand on the same footing with the funeral expenses of the deceased, for which, he says, a recovery may be had against the executor in his representative character. In the case of *Corner v. Shew*, 3 Mees. & Welsb. 350, the authorities on the subject were reviewed, and the subject fully discussed and examined, as well by the counsel of the respective parties as by the court. The authorities relied on in that case for the proposition that the funeral expenses constituted a charge on the estate, and could be demanded of the executor as such, were *Tugwell v. Heyman*, 3 Camp. R. 298; *Rogers v. Price, Young & Jer.* 28; and *Lucy v. Wal-*

ronde, 32 Eng. C. L. R. 349. "With respect to the two first cases, (Parke, B., said,) it was no doubt decided by them that there is an implied promise on the part of an executor, who has assets, to pay the reasonable expenses of such a funeral of his testator as is suitable to his degree and circumstances. It was contended, however, at the bar, that those decisions were against a prior authority and were wrong, (a question upon which it is not necessary for us to give any opinion,) but that, if they were right, the only point really determined was, that the law implies a contract on the part of the executor *personally*, and not in his *representative character*; and we are all of that opinion." And of the last case he disposes by saying that the point was not then discussed, and that the case was decided on the ground of payment of money into court. I have examined these cases, and think that the foregoing views, with respect to the authority to be deduced from them, are correct; and that the conclusion to which the whole court, in *Corner v. Shew*, arrived, viz: that the executor as such cannot be made liable for the funeral expenses of the testator, may now be regarded as the well settled law in England. In this country the weight of authority is in favor of the same conclusion. In *Myer v. Cole*, 12 John. R. 349, and in *Demott v. Field*, 7 Cow. R. 58, counts on promises by the testator were joined with counts on promises by the executor as such to pay for the funeral expenses of the testator; and in each case it was held that the declaration could not be sustained; the counts on the promises by the testator requiring a judgment *de bonis testatoris*, and the counts on the promises by the executor to pay for the funeral expenses, judgments *de bonis propriis*. The court said that the last mentioned promises were personal; and though the estate of the testator in the hands of the defen-

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dant would be liable over to him for the funeral expenses, that did not alter the form of the proceeding.

In *Hapgood v. Houghton*, 10 Pick. R. 154, which was *assumpsit* against an executor, a count on a promise by the testator was joined with a count for the funeral expenses, alleging that they were incurred at the request of the executor, and that he as such promised to pay therefor; and the court held there was no good objection to the joinders. It will be seen, however, that the plaintiff mainly relied on a statute; the count for the funeral expenses, after stating that they were incurred with the consent and knowledge and at the request of the defendant, adding "that thereby, and by force of the statute in such case made and provided, the said defendant *in his said capacity* became liable to pay the same, and in consideration thereof, as executor, promised," &c. And the court, in delivering its opinion, is, I think, fairly to be understood as resting its judgment mainly on the statute. In the case of *Parker v. Lewis*, 2 Dev. R. 21, it must be conceded the question seems to have been untrammelled by such considerations, and to have been decided on the views which the court entertained of the rule of the common law on the subject; and it was then held that such expenses are a charge on the assets, independently of any promise by the administrator, upon the ascertainment of the fact that they are of that description, and proper for the estate and degree of the deceased. And an instruction given in the court below that the defendant was liable for them in his character of administrator, without a previous request or promise, was sustained. The case, however, stands opposed to the current of decisions on the subject; and I think we are well justified in regarding it as settled that such expenses constitute no exception to the general rule, which charges the executor in his individual and not

in his representative character, for claims against the estate originating since the death of the decedent. Be this as it may, the authorities seem to be almost uniform in holding that all other services rendered for the estate after the death of the testator charge the executor, if at all, personally. And in addition to those already referred to as sustaining the general principle, from which such a rule may be deduced, may be cited the cases of *Vaughn v. Gardner*, 7 B. Monr. R. 326, and *Lovell v. Field*, 5 Verm. R. 218, in which the precise question was decided. In the former it was decided that with promises by the testator to pay for work and labor done and services rendered for him in his life time, might be joined promises to pay for the same by the executor; whilst promises by the executor in consideration of services performed for him as executor could not be: Because the judgment in both of the first mentioned promises would have to be *de bonis testatoris*, and on the last *de bonis propriis*. And in the latter the same principle was announced. The court said that the administrator could not promise to bind the estate for goods furnished for the benefit of the estate. The promise is his own, and he is personally liable. He may make it on the credit of the estate in his hands; but whether he has a right to pay out of the same depends on its receiving the sanction of the probat court.

It seems to me, from this view of the law, that the promises set forth in the two first counts can create no liability on the executor as such, and charge him only personally. If the third count was of the same kind, the judgment of the court overruling the demurrer might most probably be sustained. For in the case of *Corner v. Shew*, heretofore cited, it is stated as law, that if the defendant could not, under any circumstances, be liable to the charges made against him *as executor*, those words, in the declaration, might be

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struck out as surplusage ; which, however, could not be done in a case in which a defendant could on any supposition be liable in that character to the contract or demand declared on. And in 2 Williams' Ex'ors 1096, it is said that where the nature of the debt is such as necessarily to make defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as executor. In the case of *Sims v. Stillwell*, 3 How. Miss. R. 176, the rule is stated in very much the same terms ; and in 2 Williams' Ex'ors 1099 it is said that when the executor is personally liable, the naming him executor may be regarded as surplusage.

The third count is for divers sums of money paid, laid out and expended by plaintiff for the use of the defendants as executors. Under such a count facts might have been shown which would have justified a recovery *de bonis testatoris*. It seems to be now well settled that a count against an executor for money had and received cannot be joined with a count for money due to plaintiff by defendant as executor upon an account stated with him of money due from him as executor : The first being treated as showing a personal charge on the executor, and the last a charge against the estate. *Ashby v. Ashby*, 14 Eng. C. L. R. 77. In that case there were three counts against the defendant as executor. The first for money paid, &c., to the use of defendant as executor ; the second for money received by defendant as executor to the plaintiff's use ; and the third on an account stated. The court holding it clear, according to the authorities, that there was an improper joinder of the second and third counts, did not deem it necessary to decide upon the character of the first, though there was a strong intimation of opinion that the first count was for matter which charged the executor in his representative character. Bayley, J., said : " In the first count of the

declaration before us, the money is stated to have been paid by the plaintiff, to the use of the defendant as executor. That imports that the plaintiff has paid it, not on the personal account of the defendant, but that he has paid it for him because he was executor; that, as it seems to me, in release of something which would otherwise have been a burden on the assets of the testator. I think that the plaintiff, having paid the money to the use of the defendant as executor, has the same right that before such payment belonged to the person to whom it was made, and consequently, that he (the plaintiff) may charge the assets of the testator. To put a plain case: Suppose two persons are jointly bound as sureties; one dies; the survivor is sued, and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and I think he is entitled to sue the executor of the deceased for money paid to his use as executor." Like opinions were expressed by other members of the court. In the argument of the case of *Corner v. Shew* it seems to have been conceded that such was the law; and it was also thus held in the case of *Collins v. Weir*, 12 Serg. & Rawle 97. The character of a count for money had and received, and of a count on account stated against an executor, had been considered by this court, and adjudged in accordance with the decision in *Ashby v. Ashby*; it being decided in *Fairfax's Executors v. Stover*, 2 Call 514, that on the former the judgment should be *de bonis propriis*, and in *Epes' adm'r v. Dudley*, 5 Rand. 437, that on the latter the judgment should be *de bonis testatoris*. I see no reason for doubting that the opinion expressed in that case (*Ashby v. Ashby*) with respect to the count for money paid, i. e., to the use of the executor, is also now the law. Each being the case, there was an improper joinder of

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counts in the declaration ; and the court, instead of overruling, ought to have sustained the demurrer.

On the trial an exception was taken to the action of the court in refusing to give certain instructions asked by the defendant. The facts of the case are, however, not stated, and in their absence we cannot undertake to decide whether the court did right or wrong in refusing.

I think, therefore, that in accordance with *Hale v. Crow*, 9 Gratt. 263, and *Strange v. Floyd*, 9 Gratt. 474, the judgment should be reversed, and the cause remanded, in order that the defendant in error may amend his declaration, if so advised ; and on his failure to make a motion to that effect, that the court may render judgment for the plaintiff in error.

The other judges concurred in the opinion of DANIEL, J.

JUDGMENT REVERSED.

Lewisburg.**McNEEL v. HEROLD.**(Absent *Daniel, J.*)

July 25th.

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- . An entry of waste and unappropriated land, to be valid, must call for objects which possess that notoriety in themselves, or they must be so particularly described, that other persons, by using due care and reasonable diligence, may readily find them.
- . The general or descriptive calls, and the particular or locative calls, of the entry must possess that reasonable degree of certainty which will put a subsequent adventurer duly upon his guard; and the locative calls must be found to be embraced within the descriptive calls, and they should properly be consistent with the latter and with one another: Though in certain cases, where all the calls of an entry cannot be satisfied, the courts, for the purpose of sustaining it, will reject such as appear vague and repugnant, and hold to those appearing to be certain and consistent.
- . Where there are several distinct and independent calls in an entry, it is not necessary that all the objects thus called for should be known and recognized by the public; or that they should all be described with that specialty that a subsequent locator can readily find them: But it is necessary that some one or more of the leading calls should be thus known, or so described that other persons, with due care and proper diligence, may be led to ascertain their positions, and thus distinguish the land appropriated from the adjacent residuum.
- . The objects called for are sometimes so connected with the general history or geography of the country or its legislation, that the courts will take notice of them; and they will be deemed of general notoriety and sufficiently identified without further proof: And an entry calling for such objects may be supported without proof of notoriety or identity.
- . When the objects called for possess but a local notoriety, the party affirming the validity of the entry must prove the identity of the land intended to be appropriated, and that the calls of the entry are such that a subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the surrounding lands, so as to appropriate for himself the adjacent residuum.
- . In a *caveat*, where the objects called for in the entry are not

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of such public notoriety as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence, and are such as is required to make it a valid entry; and a finding defective in these respects will not be remedied by finding that the survey was made in conformity with the entry.

7. A party who files a *caveat* must show a title to the warrant under which his own entry and survey were made; and if he fails to do so, his *caveat* will be dismissed.

On the 23d of July 1849 Benjamin Herold made an entry with the surveyor of Pocahontas county, of three thousand acres of land on the waters of the Slate fork and Big Spring fork of Elk river, being the same land embraced in a deed to the said Herold and one David Hanna from Lewis Pennell, recorded in the clerk's office of said county. The entry also described the land as adjoining the lands of G. B. Moffett and five other persons named, and a survey called "Adams' survey"; and it purported to have been made by virtue of part of a warrant of three thousand five hundred and ninety acres, No. 17826.

On the 27th of April 1850 Herold made a survey purporting to be on his said entry, but embracing three thousand nine hundred and seventy acres. The local description of the land is the same as in the entry, with the addition of the courses and distances of the lines constituting the exterior boundary, the different kinds and position of timber trees adopted as the corners, and the crossings of water courses intersected by some of the lines. This survey purports to have been made, as to three hundred and eighty acres, by virtue of part of a warrant of one thousand acres, No. 18216, and as to three thousand five hundred and ninety acres, by virtue of a warrant of three thousand five hundred and ninety acres, No. 17826.

On the 4th of May 1850 Paul McNeel entered with the same surveyor two thousand acres of land on both sides of the Big Spring fork of Elk river, to include all the vacant land between a tract known as the

"Sherwood and Pennell land," also as "Lot No. 7," which was believed to corner on a crooked sugar tree, near the old Augusta county line, lands of Samuel V. Gatewood, particularly the old place patented to Jacob Warwick, the land purchased of Rowland, known by the names of "Cherry-tree hollow" and "Tallow knob," an entry made by William Skeen on the 29th of April, an entry made by William H. Floyd of the same date, a survey made for William Sharp on the 22d April, a survey made for John Hanna, David Hanna and Henry Buzzard on the 23d of April, and a survey made for David Gibson on the 24th of April, all of the same year.

On the 22d of January 1851 McNeel made a survey upon his said entry, embracing within its lines one thousand four hundred and fifty acres only.

On the 2d of March 1851 McNeel filed a *caveat* in the Circuit court of Pocahontas, against the issuing of a grant to Herold upon his said survey, upon the ground of better right in himself to one thousand two hundred acres of the land embraced in Herold's survey, under and by virtue of his entry of two thousand acres, and his survey thereon of one thousand four hundred and fifty acres. The *caveat* also assigns in detail the various grounds upon which the caveator claimed to have better right to the said one thousand two hundred acres, all impeaching the regularity and validity of Herold's survey.

In September 1852 the parties came to trial, and a jury was impaneled for the finding of the facts. They found the entry and survey of Herold, setting them out in their finding in *in hæc verba*. They also found an entry made by him on the 7th of August 1850, (after his survey and after McNeel's entry,) of nine hundred and seventy acres of land, calling to begin at Adams' corner on the top of Elk mountain, and running with his line to Mathews' survey, and to

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embrace all the land between said line and his own survey, adjoining the land of Porter and others. They also found McNeel's entry, setting it out *in hæc verba*; and they found that he had made a survey upon his said entry; but they do not set out this survey or otherwise describe it than as embraced within the lines shaded pale red on the plat accompanying the surveyor's report made in the cause. They also found "that the defendant's survey was made in conformity with his entry; and that said entry and survey are correctly represented by the lines" shaded green on the surveyor's plat.

The foregoing being all the facts found by the jury, and none appearing to have been agreed by the parties, the caveator moved the court to set aside the finding, because contrary to evidence, because it did not find all the material facts proved by him, and because those which were found were too uncertain and insufficient to authorize a judgment in favor of the caveatee. But the court overruled the motion; and the caveator excepted, setting out in his bill of exceptions the evidence given on both sides at the trial. This consisted of the entries and survey before mentioned of Herold, the entry and survey of McNeel, the deed referred to from Pennell to Herold and Hanna, a grant from the commonwealth to Joseph Pennell for five thousand acres of land, an act of assembly annexing a portion of the county of Augusta to the county of Monongalia, together with parol testimony as to the locality and boundaries of the land granted to Pennell, and of that portion conveyed to Herold and Hanna, and as to the locality of the lands claimed by Moffett, Gibson and others, called for in the entries of Herold and McNeel respectively. The court then proceeding to pronounce on the facts found by the jury, gave judgment in favor of the caveatee; and the caveator obtained an appeal to this court.

Reynolds and Price, for the appellant.

Smith and Caperton, for the appellee.

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LEE, J. This is a *caveat* from the Circuit court of Pocahontas county, under the provisions of the statute in relation to the mode of acquiring title to waste and unappropriated lands within this commonwealth, originally introduced into our system by the act of May 1779, ch. 13, entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands." Neither party has the legal title, but it is a contest of equities, both claiming under entries made with the surveyor of Pocahontas. The entry of the caveatee was made on the 23d of July 1849; that of the caveator was made on the 4th of May 1850. The caveatee, it appears, made a second entry for nine hundred and seventy acres of land, under which also he claims; but this was not made until the 2d of August 1850, after he had made a survey upon his first entry, and after the caveator had made his entry. Each party has made a survey conforming, as he claims, to his entry, and as they are found to conflict, the question is, which has the better right? Thus the validity of the respective entries is directly and necessarily involved, and each party has in turn assailed the validity of the entry of the other.

To constitute a valid entry, there must be a reasonable degree of certainty and precision in the description which it gives of the subject intended to be appropriated. In the case of a grant, if the description be such that, when verified by the proofs of what is found on the ground, the land can be identified, it is sufficient, and the grant can be maintained; but more is required in the case of an entry. It is not sufficient that the land can be identified by means of the proofs of the land-marks called for, which the private know-

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ledge of the claimant can supply; but the entry must be made with that degree of certainty and specialty that a subsequent locator may be enabled, by the exercise of due care and reasonable diligence, to appropriate the adjacent residuum. The objects which it calls for must possess that notoriety in themselves, or must be so particularly described, that others, by using such care and diligence, may readily find them. These principles have been repeatedly illustrated in the numerous cases which have been decided by the courts involving their discussion. Of these I will content myself with referring to the following: *Hunter v. Hall*, 1 Call 206; *Currie v. Martin*, 3 Call 28; *Miller v. Page*, 6 Call 28; *Moore v. Whittedge*, Hardin's R. 89; *Smith v. Smith*, Ib. 190; *Buckner v. Feagins*, 2 Bibb's R. 138; *Davis v. Davis*, 2 Gibb's R. 134; *Bodley v. Taylor*, 5 Cranch's R. 191; *Finley v. Williams*, 9 Cranch's R. 164; *Watts v. Lindsey's heirs*, 7 Wheat. R. 158; *Johnson v. Pannel's heirs*, 2 Wheat. R. 206; *Matson v. Hord*, 1 Wheat. R. 130; *McArthur v. Browder*, 4 Wheat. R. 488; *Littlepage v. Fowler*, 11 Wheat. R. 215; *Garnett v. Jenkins*, 8 Peters' R. 75; *Key v. Matson*, Hardin's R. 70.

Entries in Virginia and Kentucky, made for the purpose of acquiring title to waste and unappropriated lands, in the mode prescribed by law, usually first refer to some prominent and notorious object, which serves to direct attention to the particular neighborhood in which the land is situate, and then call for some particular object or objects which shall describe it with precision. The former has been termed the "general" or "descriptive" call, the latter the "particular" or "locative" call of the entry. Both must possess that reasonable degree of certainty which will put a subsequent adventurer duly upon his guard, and the locative calls must be found to be within the limits embraced by the descriptive call, and they should

properly be consistent with the latter and with one another. *Johnson v. Pannel's heirs*, 2 Wheat. R. 206; *McDowell v. Peyton*, 10 Wheat R. 454. Though, in certain cases, where all the calls in an entry cannot be satisfied, the court, for the purpose of sustaining it, will reject such as appear to be vague or repugnant, and hold to those appearing to be certain and consistent. *Marshall v. Currie*, 4 Cranch's R. 172; *McIver's lessee v. Walker*, 9 Cranch's R. 173; *Massie v. Watts*, 6 Cranch's R. 148; *Shipp v. Miller's heirs*, 2 Wheat. R. 316; *Evans v. Manson*, 1 Bibb's R. 4; *Patterson v. Bradford*, Hardin's R. 101; *Bosworth v. Maxwell*, Ibid. 205.

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Where there are several distinct and independent calls in an entry, it is not required that all the objects thus called for should be known and recognized by the public, or that they should all be described with that specialty that a subsequent locator can readily find them; but it is necessary that some one or more of the leading calls should be thus known, or so described that other persons, with due care and proper diligence, may be led to ascertain their positions, and thus to distinguish the land appropriated from the adjacent residuum. *Garnett v. Jenkins*, 8 Peters' R. 75; *McCrackin v. Steele*, 1 Bibb's R. 46.

The objects sometimes called for are so connected with the general history or geography of the country, or its legislation, that they will be taken notice of by the courts and deemed of general notoriety, and sufficiently identified without further proof: Such are rivers used as public highways, or thoroughfares between different parts of the country, or which are referred to in general laws and designated as boundaries of counties or other districts of country. Mountains and points on the same may possess this character. And an entry calling for such objects may be supported without proof of notoriety or identity.

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Such was the entry in *Watts v. Lindsey's heirs*, 7 Wheat. R. 158. There the "Ohio river" and "Little Miami river" were regarded as sufficiently notorious and identified without further proof. So the notoriety of the "Lower Blue licks" was presumed. *Hart v. Bodley*, Hardin's R. 98. In *Speed v. Severe*, 2 Bibb's R. 131, "Salt river" was regarded as a stream sufficiently notorious to be taken notice of without proof of its course or locality. So of "Licking river." *Bowman v. Melton*, Ibid. 151. So the "Blue licks," from their connection with the general history of the country, were deemed notorious, and sufficiently identified without further proof. *McKee v. Bodley*, Ibid. 481. So of the "Kentucky river." *Winslow v. Holders' heirs*, 2 Litt. R. 34.

In other cases, the objects called for possess but a local notoriety, or furnish a description of the land which must be verified and applied by means of facts to be ascertained on the spot; and the party affirming the validity of the entry in such a case must make out in proof the necessary facts to show the identity of the land intended to be appropriated, and that the calls which it contains are such that the subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the lands surrounding, so as to appropriate for himself the adjacent residuum.

The entries of the respective parties in this case are of the class just described; and to maintain their validity, it should be shown that there were such objects to be found as are called for, that their relative positions were such as to mark out and identify the land intended to be entered, and that they or some of them were so well known in the neighborhood as to furnish such a precise and certain description of the land that it could be found by strangers using reasonable diligence and making proper enquiry. But upon examin-

ing the meagre finding of the jury, it will be seen that it is entirely silent upon these most material subjects. It no where finds that there are streams known as the "Big Spring fork" and "Slaty fork" of Elk river, or what is the particular or general course of either. It does not find that there is any tract of land known as "Lot No. 7," or as the "Sherwood and Pennell land," its situation and boundaries. It does not find there were such lands claimed by Gatewood as those referred to and described in the entries, nor any such as are said to be claimed by Moffett, Gibson and others, nor that there were such entries or surveys as those referred to; nor does it ascertain the land said to be embraced in the deed to Herold and David Hanna, nor that there was such a deed either in fact or by general reputation; nor does it ascertain the positions of any of the objects called for. In short, it wholly fails to find the material facts upon which, and upon which alone, the court could safely undertake to pronounce that either entry had been made with the necessary certainty and precision.

No aid is derived from the finding that the entry and survey of Herold are correctly represented by the lines shaded green on the plat of the surveyor, and that those of McNeel are described by the lines shaded light red. The verity of the plat and report of the surveyors is not ascertained, nor are the objects intended to be represented on the plat found as part of the facts of the case. Nor, indeed, could they have been so found by reference to the plat, because the lands represented are laid down according to the pretensions of the parties respectively; and the plat is only referred to in the finding for the purpose of exhibiting the exterior boundaries of the surveys. Nor is the defect cured as to the entry of Herold by the finding that his survey was made in conformity with his entry; because, as we have seen, an entry might well

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be susceptible of identification by means of a survey made by the party himself, and yet its calls might lack that certainty and precision which would be required to render it valid as against a subsequent locator. And moreover, whether a survey does conform to an entry is a matter to be determined by the court upon the facts found, and not to be disposed of in a summary way by the jury, as in the finding in this case.

Nothing is said in the finding of the jury as to the ownership of the warrants on which the respective entries were made; nor is it found in whose names they were issued. The numbers and quantities of land are the only items of description given. Yet a party who caveats must show a title to the warrant under which his own entry and survey were made, and if he fail to do so his *caveat* will be dismissed. *Currie v. Martin*, 3 Call 28. In that case it is true the entry of the caveator Martin was made by virtue of part of two warrants issued, one in the name of one McWilliams, and the other in the name of one Goodwin; and it was not proven that they had ever been assigned to Martin. His *caveat* was accordingly dismissed. Whether upon a special finding of facts in a *caveat* case the court can infer that the caveator was the owner of the warrant under which the entry was made, where it does not appear in whose name it issued, and no other proof of ownership is offered except that the entry purports to have been made upon it, is a question not free from difficulty. In the view I take of this case, however, it is perhaps not necessary that it should be decided, and I therefore forbear the expression of any opinion upon it.

But there are still other objections to the finding of the jury. I think it is plainly obnoxious to the charge of repugnancy upon its face. Thus it finds that Herold's entry and survey are both correctly represented

by the lines shaded green on the plat of the surveyor ; yet it ascertains that the entry is for three thousand acres, while the survey is for three thousand nine hundred and seventy acres, and thus that both quantities are embraced within and bounded by the same identical lines.

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Again : The entry of Herold is dated on the 23d of July 1849, and purports to have been made by virtue of part of a warrant of three thousand five hundred and ninety acres, No. 17826. The survey was made on the 27th of April 1850, and purports to be, as to three hundred acres, by virtue of part of a warrant of one thousand acres, No. 18216, and as to three thousand five hundred and ninety acres, by virtue of a warrant of three thousand five hundred and ninety acres, No. 17826. But it also finds that the entry of the nine hundred and seventy acres, the excess in the quantity of the survey over the original entry of three thousand acres, was not made till the 7th of August 1850, upwards of three months after the survey of the three thousand nine hundred and seventy acres. Yet it finds that the caveatee's survey was made in conformity with his entry.

It will be found, too, upon examining the evidence given on the trial, that the finding is, in one and perhaps a very material particular, not to be reconciled with it. Herold's entry, as we have seen, purports to be for the same land embraced in the deed from Pennell, and thus in terms is confined to the land embraced within the boundaries of that deed. McNeel's entry calls to adjoin a tract of land known as the " Sherwood and Pennell land," or " Lot No. 7," and thus is confined to the land lying outside of the boundaries of that tract. The grant for this Lot No. 7 of five thousand acres, and the deed for the three thousand acres of land referred to in Herold's entry, are given in evidence, and it distinctly appears that the latter is part

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and parcel of the former, being the northeastern portion thereof. Thus the entries are shown to call for wholly different lands, and there should be no conflict between them.. Yet the finding of the jury ascertains that the entry of Herold embraces much the larger part of the land entered by McNeel, the interlock being from one thousand to one thousand two hundred acres in extent.

I deem it unnecessary to enquire whether the finding may not be obnoxious to criticism in other respects. I think it must be apparent that the facts which it ascertains were not sufficient to enable the court to render judgment safely and understandingly upon the merits of the case. The only alternatives were to dismiss the *caveat* or to set aside the finding and award a *venire facias de novo*. The court adopted the former; and in this, according to the modern and more liberal practice, I think it erred. As the caveator's case may be a good one, though certainly not made out by the facts found, and as the merits of the controversy could not be presented and adjudicated upon the finding of the jury, I think it would have been right to set it aside, and to give the parties an opportunity, upon another trial, of presenting the real case between them for adjudication.

I am of opinion to reverse the judgment, to set aside the finding of the jury, and to remand the cause for a *venire facias de novo*.

The other judges concurred in the opinion of LEE, J.

JUDGMENT REVERSED, and *venire de novo* awarded.

Lewisburg.

JOHNSTON & wife v. SLATER & al.

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July 25th.

1. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.
2. A deed admitted to record upon proof by the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors; not having been duly recorded.

This was an action of ejectment in the Circuit court of Ohio county, in which the lessees of James C. Johnston and Sophia, his wife, were plaintiffs, and Thomas Slater and John T. Churchill were defendants. The facts are stated by Judge *Samuels* in his opinion. The parties dispensed with a jury, and submitted the case to the decision of the court. There was a judgment for the defendants; from which the plaintiffs obtained a *supersedeas* to this court.

Baxter and *Bibb*, for the appellants.

There was no counsel for the appellees.

SAMUELS, J. This cause is brought here by *supersedeas* to a judgment of the Circuit court of Ohio county, in favor of the defendants, in an action of ejectment, in which the plaintiffs counted on a joint demise by James C. Johnston and Sophia, his wife, and on a separate demise by James C. Johnston. Slater and Churchill, on their motion, were admitted defendants.

The plaintiffs and defendants respectively relied upon titles to the property in controversy, derived from

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Hampden Zane ; and the case before the court must be decided by a comparison of those titles. That of the plaintiffs is under a deed from Zane, dated April 1842, conveying to Sophia H. Johnston, one of the plaintiffs' lessors, the subject in controversy, being a lot or piece of ground in the city of Wheeling, in Ohio county. This deed was attested, and subsequently proved, by William F. Peterson, W. W. Shriver and James C. Johnston, before the clerk of the County court of Ohio county, in his office, and recorded by him. The witness, James C. Johnston, at the time of the attestation, and at the time of proving the deed, was the husband of the bargainee, Sophia H. Johnston. The plaintiffs' lessors, or either of them, at no time had actual possession of the lot conveyed.

The title of the defendants is derived under a deed from Hampden Zane, dated March 14th, 1844, by intermediate conveyances. By that deed he conveyed to William H. Churchill a large quantity of real property, in trust to secure certain creditors certain sums of money due to them from the grantor. At the time of executing this conveyance neither the trustee nor any of the creditors secured by the deed had any actual notice of the deed of April 1842 to Mrs. Johnston. The parties claiming the legal title derived by conveyances after the deed of March 14th, 1844, and embracing the property in that deed, are shown by the record to have had no actual notice.

In the argument here the plaintiffs' counsel make the question whether the lot conveyed in the deed of April 1842 is embraced by the deed of March 14th, 1844. The record shows that Hampden Zane derived title to all the property embraced by either deed, by devise from his father, Noah Zane ; and the deed of March 14th, 1844, declares that " it is understood that all the lands and tenements, rights and privileges, devised and bequeathed by said Noah Zane to said

Hampden Zane are hereby conveyed, and intended to be conveyed, to said William H. Churchill," &c. This description embraces the lot in controversy.

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The plaintiffs' counsel earnestly insist that the deed of April 1842 was duly recorded within the true intent and meaning of the registry acts; and that being prior in date, should be held to pass title to the lessor, Sophia H. Johnston. The only objection to the registration of this deed is the fact that its execution was proved before the clerk by Johnston, the husband of the bargainee. Was he a witness within the meaning of the statute? The obvious reply is that the legislature must have intended that the witnesses to the deed should be competent to prove the transfer of property from the bargainor to the bargainee; that they should be competent, according to the general rules of evidence, to prove the very fact to which they testify. If Johnston can be held competent to prove the execution of a deed to his wife, it must be held that he would be competent to prove the execution of a deed to himself. From the intimate relation between husband and wife, and from the strong bias of feeling towards each other, the law has provided that neither shall be a witness in regard to any subject in which the other is interested. There are circumstances in which, from necessity or convenience, the evidence of a party himself may be heard; as, for instance, to prove cause for postponing a trial, or to prove the loss of papers for the purpose of letting in secondary evidence of their contents; but there is, perhaps, no case in which the evidence of a party can be heard to prove in his own behalf his title to property. If the witness to this deed would have been disqualified by interest a witness to a deed to himself, the interest of the wife, and his own interest consequent thereon, would disqualify him as a witness to this deed. If we look to the consequences of the construction contended for by

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the appellants' counsel, we must see strong reasons why it should not prevail. A recorded deed is evidence of itself. *Baker v. Preston*, Gilm. 235; *Pollard's heirs v. Lively*, 4 Gratt. 73. By holding that an interested party may, by his own oath, aid in putting his deed on the record, and thereby absolve himself from the duty of offering further proof when the execution of the deed is thereafter drawn in question, or that thereby he may impose on others the burden of disproving the execution, is to give such party an undue advantage; such as neither the plain letter or the spirit of the statute requires or sanctions.

The cases above cited show a difference between our law of evidence and that of North Carolina, which requires at our hands a different decision from that rendered by the Supreme court of that state in the case of *Jones' lessee v. Ruffin*, 3 Dev. R. 404.

The plaintiffs' counsel, in effect, if not in terms, argued further, that the registration of a deed has two several and distinct functions: 1. To give notice to purchasers. 2. To furnish evidence when the execution of the deed shall be drawn in question. That the first of these functions will be effectually performed, whatever may be the proof upon which the registration was made; that the defect in the proof of execution may be supplied at the trial when the deed is offered as evidence. This argument but carries out the case from North Carolina, above cited, and that of *McKinnon v. McLean, &c.*, 2 Dev. & Bat. Law R. 79, to their legitimate results. The argument cannot avail here, in view of our statute and the decisions under it. It is clearly within the scope of the legislative power to declare what shall be essential to making a valid deed between the parties to it, and as against third parties. In the exercise of this power, it has been declared that certain things shall be essential to all deeds; that registration is not necessary be-

tween the parties to a deed; that it is not necessary as against volunteers or purchasers with notice: but it has further declared that a deed shall be void as against purchasers for value without notice, unless recorded upon authentication in one of the modes prescribed. One of these modes is proof by *three witnesses*, which was attempted in this case. As against such parties registration is equally essential with signing, sealing, delivery, or any other thing required to give validity to the deed. *Carter v. Champion*, 8 Conn. R. 549.

By holding a deed irregularly registered to be a valid instrument of notice, and that, by proving its execution on any trial in which it may be drawn in question, it shall have the effect of a deed, the statute is effectually repealed. There can be no purchaser without notice of such deed. The statute is found, 1 Rev. Code, p. 361-2, § 1, 4; the cases are *Turner v. Stip*, 1 Wash. 319; *Currie v. Donald*, 2 Wash. 58; *Dawson v. Thruston & als.*, 2 Hen. & Munf. 132; *Manns v. Givens*, 7 Leigh 689; *Pollard's heirs v. Lively*, 2 Gratt. 216; *Hodgson v. Butts*, 3 Cranch's R. 140.

Adhering to what I regard as the meaning of the statute, and following the cases in this court, I am of opinion that the deed of April 1842 cannot be regarded as a recorded deed.

The record shows distinctly that the parties holding the title, and claiming under the deed of March 14th, 1844, had no other notice of the deed of April 1842 than such as might be implied from the registration of that deed; and this registration I have shown was void by the terms of the statute.

The plaintiffs' counsel further argued that the parties claiming under the deed of March 14th, 1844, were not purchasers at all; or at least were not purchasers for value. It is well settled that a creditor taking a deed of trust on real estate to secure his debt is a purchaser

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within the purview of the law. *Beverley v. Brooke*, 2 Leigh 425; *Tate v. Liggatt*, Id. 84.

That the creditors secured by the deed of March 1844 were purchasers for value is shown by the fact that their *bona fide* debts thereby secured amounted in the aggregate to about ten thousand dollars.

The deed of April 1842 having no effect as a recorded deed, the parties to the subsequent deed of March 14th, 1844, at the time it was executed, having no notice of the first, and the parties now holding the legal title, derived by intermediate conveyances from the deed of March 14th, 1844, having acquired that title by purchase for value without notice, their title is doubly secured by their own purchase and that of the bargainees in the deed of March 14th, 1844.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of *Samuels, J.*

JUDGMENT AFFIRMED.

Lewisburg.

JARRETT v. JOHNSON.

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July 25th.

1. Where there is a joint purchase of land by two, to whom it is conveyed, and who give their bond for the purchase money, in the absence of proof of any agreement between them to the contrary, they are entitled to the land in equal proportions.
2. One of the purchasers, having previously made a conditional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed this other should have a specified part of the land: but the contract was not completed. This agreement between the purchasers was then at an end, and cannot affect their rights under their joint purchase.
3. In such case of a joint purchase parol evidence is not admissible to prove an agreement between them for an unequal division of the land.
4. In such a case the purchaser claiming to be entitled, under an agreement between them, to the largest portion of the land, files a bill for a specific performance of the agreement, and for partition accordingly: Though he fails in this, the court may go on to make a partition according to the legal rights of the parties.

By an agreement, under their hands and seals, between James McDowell, of Rockbridge, and Barnabas Johnson, bearing date the 8th day of September 1849, McDowell contracted to sell to Johnson a tract of land containing about eight hundred acres, lying in the county of Monroe, upon the Greenbrier river and Wolf creek, for the sum of nine thousand dollars; to be paid one-third by the 10th of October 1849, and the balance in two equal annual payments, with interest from this last date. But it was provided that this agreement should not be absolute and conclusive upon either of them before the 1st of October 1849; up to which time each of them should have the right to

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withdraw from it, by giving to the other a written notice to that effect. But if McDowell withdrew from it because some higher price was offered him for the land than that contracted to be given, he should in that case first offer the refusal of it to Johnson, before he should have the right to sell to any other person.

On the 26th of September 1849 an agreement, also under the seals of the parties, was entered into between Barnabas Johnson and James Jarrett, by which they agreed to divide the land that Johnson had conditionally purchased of McDowell. If Johnson should get the land, Jarrett was to have the river end of the land; the dividing line to be the middle of the turnpike, commencing at the river near to Newman's canal landing opposite the turn of the turnpike; thence with the turnpike through the land; and he was to pay his proportion of the purchase money according to the number of acres he should get.

Within the time prescribed in the agreement between McDowell and Johnson, McDowell declined to execute the contract, and gave notice thereof to Johnson; and he was not induced to this course by the offer of a better price for the land by any other person. Having declined to execute the contract with Johnson, McDowell, on the 15th of October 1849, executed a power of attorney, whereby he authorized Robert J. Taylor to investigate and settle, as he might think just, a certain claim or obligation in writing which James Jarrett alleged that he held upon McDowell for the sale to him, upon specified terms and conditions, of his land in Monroe county, on Greenbrier river and Wolf creek. And he also authorized his said attorney to enter into a written contract with said Jarrett, or with any other person, for the full and complete sale to him, or any of them, of the said land; upon certain terms as to the purchase money, which was not to be less than nine thousand

five hundred dollars. Taylor states: That in October 1849 he carried a letter from McDowell to Jarrett, and told him that the land was up again for sale, and made to him a proposition for the sale of it to him; but he declined making any offer until Taylor had seen or was done with Mr. Johnson. That he went to see Johnson and made him several propositions; but he declined all the offers made to him. That the next day Jarrett, Johnson and himself all met on the land. Johnson was asked if he was done, and declared he had gone as far as he could go, in the conditional purchase he had made of McDowell. That several propositions then passed between Taylor and Jarrett, all of which were declined, and Jarrett said he was off. Jarrett and Johnson then held a private conference between them; and after it was over Johnson came up to Taylor and said that he and Jarrett would take the land at nine thousand five hundred dollars. This proposition was accepted; and by an agreement bearing date the 20th day of October 1849, executed by the three, McDowell, by his said attorney, sold to Jarrett and Johnson the tract of land aforesaid for the sum of nine thousand five hundred dollars, for the deferred payments of which Jarrett and Johnson agreed to execute their bonds. And by deed bearing date the 5th of November 1849, McDowell conveyed the land to Johnson and Jarrett.

Immediately upon the purchase of the land there was a controversy between Johnson and Jarrett as to how the land should be divided between them: Johnson insisted that Jarrett was to have only that part lying north of the turnpike road, which he was to have under the first agreement between them; and Jarrett insisted that he was entitled to one-half of the land. In July 1850 Johnson instituted a suit in the Circuit court of Greenbrier county against Jarrett for a partition of the land. In his bill he set out his first

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contract with McDowell and his agreement with Jarrett. And he stated that he proceeded to close his contract with McDowell through Taylor, the agent of McDowell, by adding something to the price. That, relying upon the agreement between himself and Jarrett, he took from McDowell a title bond binding him to convey the land jointly to Jarrett and himself. That he never dreamed of any other partition than that indicated by the article between Jarrett and himself; nor did Jarrett utter a syllable to show that he looked to any other arrangement. But that notwithstanding all this Jarrett had taken possession of and held a part of the land which, by the terms of the agreement, was to be allotted to the plaintiff. That McDowell had conveyed the land to Jarrett and the plaintiff; but that though Jarrett is thus vested with an undivided moiety of the land, he must be considered as the owner of only that part of the land which under their written agreement he was to have, and as to all over that he held it in trust for the plaintiff. He asks for a partition of the land according to the agreement, an account of the profits, and for general relief.

Jarrett answered the bill. He insisted that Johnson's conditional purchase of the land had been set aside. That afterwards McDowell had authorized Taylor to sell the land to the defendant or any other persons. That under this authority Taylor had sold to the plaintiff and defendant. He denied that the conditional contract between McDowell and Johnson had been carried into effect; or that the plaintiff made any purchase for himself; or that the agent of McDowell sold to him individually. He said that the plaintiff did not propose to purchase the land on his individual account; nor did he assert any right whatever to take the land for himself at the higher price demanded by McDowell. That the price of the land and terms of sale were adjusted by the agent of McDowell, the

plaintiff, and defendant ; and that the purchase was a joint one, in which the plaintiff and defendant had an equal interest, each entitled to a moiety. And he denied that there was anything in his language or conduct which could induce the plaintiff to suppose that he regarded the written agreement between himself and the plaintiff as in force, or as regulating in any manner whatever their interest in the land purchased by them.

In October 1851 the court made an order directing Commissioner Cary, among other things, to ascertain and report to the court what was the agreement between the plaintiff and defendant in regard to the purchase of the land in controversy, and especially the interest which each was to have in said land. And the parties were directed to appear before the commissioner and answer upon oath such interrogatories as the commissioner should propound touching the question in controversy.

In November 1851 the plaintiff filed an amended and supplemental bill, in which he charged, that at the time the plaintiff and defendant were making the purchase of the land from Taylor, they held a conference, in which the defendant desired to have more land than he was to have under the agreement of the 26th of September 1849 ; he desired to run up to a ditch. That the plaintiff positively dissented from the proposition, or to vary the said agreement in any way so as to let the defendant cross the turnpike. That with this understanding the parties went into the contract. That the plaintiff believed that he was to have the benefit of that agreement, or he would not have engaged in the purchase. That the defendant left plaintiff so to understand ; and he charges that if the defendant designed at the time to set up a claim to an equal moiety of the land, he suppressed and concealed his design, and was thereby guilty of a fraud,

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knowing, as he did, that the plaintiff understood him differently.

Jarrett answered, admitting the conference, but denying explicitly that he made the proposition as stated in the amended bill, or that he finally assented to the alleged dissent of the plaintiff, or that they went into the contract with the understanding that the land was to be divided by the turnpike, as prescribed in the agreement aforesaid. He denied that he had said or done anything to excite any such belief or expectation on the part of the plaintiff; and alleged that, on the contrary, his language was explicit, and could have had no other effect than to lead the plaintiff to a directly opposite conclusion. That it was not true that he committed a fraud upon the plaintiff by suppressing his design to assert his claim to an equal moiety of the land; but that he distinctly informed the plaintiff that he would have half the land; and he stated to the plaintiff at their conference that the agreement aforesaid was no longer binding upon them, and that they ought to agree upon a division of the land and reduce their agreement to writing. And he told the plaintiff expressly that if the defendant bound himself for the whole of the purchase money he would have half of the land.

The parties were examined on oath by the commissioner, but their statements differed as widely as did their allegations in the bill and answer. There were also many witnesses examined by both parties, among whom was the agent Taylor, whose statement is here inbefore given. The commissioner reported that he was unable to state what was the agreement between the parties as to the division of the land, and referred the question to the court; and returned with his report the evidence which had been taken before him.

It is impossible to state the evidence bearing on the question whether there was an agreement between

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Johnson and Jarrett at the time of their purchase of the land, as to how it should be divided between them. The only fact that is certain is, that from the moment of the sale they disputed as to how the land should be divided; Johnson insisting that Jarrett should be limited to the land north of the turnpike road, which he was to have had under their agreement of September 26th, 1849, and Jarrett insisting that he was entitled to more land. The nature of the evidence is referred to by Judge *Moncure* in his opinion.

The cause came on to be heard in May 1852, when the Circuit court sustained the pretensions of the plaintiff, and directed an enquiry to ascertain the portion of the purchase money which each should have paid. And from this decree Jarrett applied to this court for an appeal, which was allowed.

William Smith and Fry, for the appellant.

Price and Caperton, for the appellee.

MONCURE, *J.* Johnson and Jarrett contracted jointly for the purchase of the land in controversy. It was conveyed to them jointly, and they executed their joint and several bonds for the purchase money. They are, therefore, entitled to the land in equal proportions, unless it can be shown that their relative rights have been changed by some valid agreement or other transaction between them. It is contended, in behalf of the appellee Johnson, that they have been so changed. And

First. It is contended that the agreement of the 26th of September 1849 is still in force, and that the land should be divided accordingly. That agreement depended entirely upon the contract between McDowell and Johnson of the 8th of September 1849. By the express terms of that contract it was not to be absolute and conclusive upon either of the contract-

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ing parties before the first of October 1849 ; up to which time either had the right to withdraw from it, by giving the other a written notice to that effect. McDowell did withdraw from it, and the contract was then at an end. It is true there was a stipulation in it, that if McDowell should withdraw because of some higher price being offered to him for the land, he should in that case offer the refusal of it to Johnson before he should have the right to sell it to any other person. But it is not pretended that he withdrew from the contract for that cause. The said agreement, being dependent on the said contract, ceased to have any effect when the latter ceased to have effect ; which was on or before the first of October 1849. After that day McDowell was at liberty to sell the land without being affected by the contract ; and Johnson and Jarrett were at liberty to purchase it, jointly or severally, without being affected by the agreement. Accordingly, on the 15th of October 1849, McDowell empowered Taylor to contract with Jarrett, or any other person, for the sale of the land. On the 19th of the same month Taylor, Johnson and Jarrett met upon the land ; and Taylor endeavored to effect a sale, first to one and then to the other. After several propositions had been made, each declined to purchase. They then held a private conference and concluded to purchase jointly at the price of nine thousand five hundred dollars, being five hundred dollars more than the price which had been stipulated for in the said conditional contract between Johnson and McDowell ; and on the next day the joint contract was executed. If Johnson or Jarrett had severally purchased the land, the one so purchasing would have been entitled to the whole in exclusion of the other. Having purchased it jointly, they are entitled to it equally, notwithstanding the agreement of the 26th of September 1849. But

Secondly. It is contended that even if that agree-

ment, *proprio vigore*, be not still in force, yet Johnson and Jarrett made the joint purchase with an express or tacit understanding that the land should be divided in the manner and on the terms prescribed by the said agreement; and that this understanding, though by parol, is binding on the parties.

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If there had been such an understanding, I think it would have been void by the statute of frauds and perjuries. *Henderson v. Hudson*, 1 Munf. 510; *Parker's heirs v. Bodley*, 4 Bibb's R. 102; *Davis v. Symonds*, 1 Cox's Cas. 402. There is a well settled distinction, in regard to the admission of parol evidence, between seeking and resisting the specific performance of an agreement. A suit for specific performance is addressed to the sound discretion of the court, upon all the circumstances. And any evidence which shows that it would be inequitable to enforce the agreement, as stated in the bill, is admissible as matter of defence. As was well said in the case of *Osborn v. Phelps*, 19 Conn. R. 63, 73, "It was not the object of the statute to give any greater efficacy to written contracts for the sale of lands than they possessed at the common law; but merely to require such contracts to be made in writing, in order to lay the foundation of a suit at law or in equity." Or, as Lord Redesdale expresses the same idea in *Clinan v. Cooke*, 1 Sch. & Lef. 39, "The statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." When parol evidence is offered in resistance of a suit for specific performance, it does not contravene the statute; and though it may contravene the rule of law which forbids the introduction of parol evidence to vary a written agreement, it may sometimes be admissible on account of the peculiar nature of the suit. But when it is offered in support of such a suit, it generally contravenes the statute, and is rarely admissible. For the doctrine on this subject I

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need only refer to the case of *Woollam v. Hearn*, and the notes thereto appended in Hare & Wallace's edition of White & Tudor's Leading Cases in Equity, published in the Law Library, vol. 71, p. 540, 596. There are some exceptions to the general rule excluding parol evidence in support of a suit for specific performance, but it is unnecessary to enumerate them, as they do not embrace this case. The cases of *Ross v. Norvell*, 1 Wash. 14, and the *Bank of the United States v. Carrington*, 7 Leigh 566, cited by the counsel for the appellee, fall within the exceptions; the former being the case of an absolute deed intended to operate as a mortgage, and the latter a case of resulting trust. The case of *Ambler & wife v. Norton*, 4 Hen. & Munf. 23, also cited by the counsel, depended on the construction of the word "averment," in our statute concerning dower, and does not affect this case. This being a suit for specific performance, falling under the general rule, and not within any of the exceptions to it, parol evidence is therefore inadmissible to prove the agreement, or any part of it.

But suppose the evidence were admissible; does it prove that there was any such understanding between the parties? Jarrett, in his answer, positively denies that there was; and, on the contrary, avers that when the purchase was made he distinctly informed Johnson that he would have a moiety of the land. The evidence does not overthrow, nor contradict, but rather tends to sustain, the answer. No witness testifies to any such understanding. The evidence relied on to prove it consists entirely of mere repetition of oral statements; which kind of evidence, as has been well said, "is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering

a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." Greenl. on Evi. § 200. The remarks of Judge Fleming on the evidence in the case of *Henderson v. Hudson*, before cited, are strongly applicable to this case; and he concludes them by saying, "Such evidence as this (were the statute of frauds and perjuries out of the way) is, in my mind, too slight and feeble to deprive any one of his freehold and inheritance, or any part thereof." Three witnesses were introduced and relied on by Johnson to prove the alleged understanding, viz: Hinchman, Hines and Humphreys, not one of whom was present at the time of the joint purchase, and all of whom testify only to admissions said to have been made by Jarrett some time thereafter. On the other hand, three of the witnesses introduced by Jarrett, to wit, Ellis, Burdett, and Taylor, the agent of McDowell, were present when the joint purchase was made, and heard nothing of any such understanding. Without reviewing the testimony of the different witnesses, suffice it to say, that on the most favorable view of the evidence which can be taken for Johnson, it shows that no agreement was ever made in regard to the division of the land between him and Jarrett, except the agreement of the 26th of September 1849, which expired by its terms as aforesaid; that they made the joint purchase without coming to any understanding about the division; Johnson insisting that Jarrett should have no more of the land than that agreement would have given him, and Jarrett insisting that he would have more, or a moiety of the land; and that their subsequent acts and declarations have been entirely consistent with this view of the manner in which they made the purchase. In this state of the case, whatever may have been the expectation of the parties, they must stand upon their legal rights under the

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joint purchase, and each is entitled to an undivided moiety of the land.

Thirdly and lastly. It is contended that Johnson entered into the joint contract with the expectation that the land would be divided in the manner indicated by the agreement of the 26th of September 1849; and that Jarrett knew that fact, and did not inform Johnson of his intention to claim any more of the land than that agreement would have given him; which was a fraud on the part of Jarrett, who can take no advantage of it, but must make good the expectation of Johnson. The doctrine referred to in Roberts on Frauds 130, and Roberts on Conveyances 529, is relied on to support this position. But it is unnecessary to investigate this doctrine, or to enquire whether, if the facts were as stated in the proposition, Johnson would be entitled to the relief which he claims. Fraud is positively denied by the answer, and is wholly unsustainable by the evidence. The only testimony tending in any way to prove it is that of Hinchman, relating to some admissions said to have been made by Jarrett some time after the joint purchase; and this would be altogether too vague and indefinite to establish so grave a charge, even if it were undenied by the answer. The charge is improbable in itself, and inconsistent with the other testimony in the cause, as I have already sufficiently shown.

The views I have taken of this case render it unnecessary to express any opinion on the questions referred to in the argument, as to the propriety of allowing the amended bill to be filed, and of making the order of the 22d of October 1851, and of the proceedings under that order. Giving the appellee the full benefit of all these proceedings, my conclusion is that the decree is erroneous and ought to be reversed with costs, and the cause remanded, in order that there may be an equal division of the land between the parties, and

that the payments respectively made by them of the purchase money, if unequal, and their receipt of the rents and profits, may be equalized. I had some doubt whether, as the bill only seeks the specific performance of an alleged agreement, and has not been sustained in that respect, it ought not to be dismissed with costs, without prejudice to another bill for the equal division of the land. That course was pursued by Sir William Grant in a somewhat similar case. *Woollam v. Hearn*, 1 Ves. jr. 211. But as the object of the parties is to have the land divided according to their rights, which can as well be done in this suit as another, it will be for the benefit of both of them to remand the cause for further proceedings, as before indicated. But at all events the costs occasioned by the assertion of the claim of the appellee to an unequal division of the land should be paid by him.

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LEE and SAMUELS, *Js.* concurred in the opinion of *Moncure, J.*

DECREE REVERSED.

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One of two coparceners contracts to sell a small part of a tract of land, professing to act for both, though without authority, and the other coparcener does not consent to the sale. Both coparceners afterwards convey the whole tract to a grantee having full notice of the agreement. The land sold is but a small part either in quantity or value of one moiety of the tract. **HELD:** That the grantee will be compelled to perform the agreement.

In the year 1836 John T. McKee and his sister, the wife of Andrew Bratton, of Bath county, owned jointly a tract of land in the county of Rockbridge, lying on Kerr's creek. On this land there was a large spring, the stream from which entered into Kerr's creek, making an acute angle with the creek, and this angle of land belonged to McKee and his sister, and constituted a part of the tract owned jointly by them.

Some years previous to the time stated Andrew Walkup owned the land on Kerr's creek immediately below McKee's spring branch, and extending up to it, on which land he built a merchant mill and saw mill, which were propelled in part by water taken from the spring branch, and in part by water taken from Kerr's creek below the mouth of the spring branch. The dam across the spring branch seems to have been little, if anything, more than a log placed in and across the stream. This land, with the mills thereon, were purchased by Samuel Barley; and in 1836, for the purpose of better getting the waters of Kerr's creek to his mill, he made a contract with John T. McKee, who acted for himself and Andrew Bratton and wife, though without their authority, by which McKee agreed to sell to Barley the triangle lying between Kerr's creek

and the spring branch, commencing at the mouth of the branch, and running up on the branch to a point above the dam in the branch, and running up on the creek to a large rock, the whole being less than an acre; and it was agreed that Barley might take the water out of the creek above the rock, and carry it across the land sold to him into his dam across the spring branch, and thus into his mill race.

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This agreement was contained in a deed bearing date the 2d day of December 1836, purporting to be by John T. McKee and Andrew Bratton and wife, but which was only executed by McKee, by which, in consideration of thirty dollars, they convey the piece of ground, with the privilege as aforesaid. This deed was attested by one witness, as to McKee's execution of it; and he gave to Barley a receipt of the same date for fifteen dollars, as one-half of the purchase money.

By deed bearing date the 20th of May 1839, John T. McKee and wife and Andrew Bratton and his wife conveyed to Samuel W. McKee, the son of John T., the tract of land owned by them jointly on Kerr's creek, embracing in the conveyance the triangle of land sold and conveyed by John T. McKee to Barley: But of the agreement with Barley, Samuel W. McKee had been informed at the time it was entered into. After this conveyance to Samuel W. McKee, differences arose between him and Barley as to the rights of the latter under his contract with John T. McKee. These differences referred to the questions how far above the rock on Kerr's creek, which was a corner of the triangle sold, Barley might take the water out of the creek and carry it through McKee's land; and how high he was authorized to maintain his dam across the spring branch. These differences resulted in two actions of trespass brought by McKee against Barley in the Circuit court of Rockbridge, to recover damages

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for injuries done, as he alleged, by Barley to his land and to his spring. Barley then filed his bill in the same court, setting out his agreement with John T. McKee, and exhibiting his deed as marked A, insisting that he had not transcended his rights under the agreement; asking for a specific performance of that agreement by Samuel W. McKee, who had received his conveyance with notice of it; that his rights under it might be ascertained and adjudicated; and that the actions at law brought against him by McKee might be enjoined. To his bill he made John T. McKee, Samuel W. McKee and Bratton and wife parties, all of whom answered. Samuel W. McKee resisted the specific execution of the contract, on the ground that John T. McKee had no authority to act for Bratton and wife, and that they never assented to it, and because the terms of the agreement were uncertain. But his objection to the specific execution of the agreement arose principally from the extent of Barley's claims under it, and the injury which he insisted he would sustain if these claims were sustained. On this last subject an immense mass of testimony was filed in the cause. But when the cause came on finally to be heard, the court declined to determine upon the true construction of the agreement, or upon the injuries of which Samuel W. McKee complained; but leaving these subjects to be settled in the actions at law, the injunction was dissolved, and a decree was made for a specific execution of the agreement, and that Samuel W. McKee should execute to Barley a deed in all respects similar to that executed by John T. McKee, except that it should be with special warranty. From this decree McKee applied to this court for an appeal, which was allowed.

Michie, for the appellant.

Stuart, for the appellee.

ALLEN, *P.* The only question presented for the consideration of the court by this appeal is, whether the final decree, directing the specific execution of the contract therein mentioned, by the appellant, Samuel W. McKee, was correct. Other matters were put in issue by the pleadings, involving the construction of the contract and the privileges it was intended to confer; some proceedings were had which looked to a decision of these questions; and nearly all the testimony in the record relates to this branch of the controversy. When the case came on for final hearing, the court properly declined expressing an opinion on any part of the case made by the pleadings, except the right of the appellee Barley to a decree against the said Samuel for a specific execution of the contract, so as to invest Barley with the legal title to the lot of land and the water privileges, alleged to have been purchased by him from John T. McKee and Bratton and wife. All other questions of law and fact, as to the effect of that legal title, the extent of the privileges conferred by it, and whether they had been abused, were left to the determination of a court of law with the aid of a jury, in the actions then pending, or which might be thereafter instituted.

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It appears from the record that John T. McKee and his sister Mary Jane, the wife of Andrew Bratton, were seized as coparceners of a tract of land on Kerr's creek, in Rockbridge county, containing two hundred and eighty-one acres. Bratton and wife resided in Bath county; John T. McKee seems to have resided on or near the land, and to have had it under his charge. From the answer of the appellant, Samuel W. McKee, it appears that in the year 1835 he rented the land from his father, the said John, and Bratton and wife; that he took possession thereof in March 1835, and has remained in possession ever since; and that on the 20th of May 1839 his father and Bratton

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and wife conveyed the land to him in fee: And he files a copy of the deed with his answer.

Whilst the appellant thus held possession as tenant, the appellee, as appears from the answer of said appellant, made an abortive effort to obtain the privilege from him to raise his dam, and presented to him a deed which he had prepared, for him to execute; alleging that John T. McKee had given to the appellant his moiety, and he would become the purchaser from Bratton and wife of the other moiety; but the appellant refused to negotiate with him on several grounds: one being that he had no title to the land. The appellee then said he would see John T. McKee on the subject, and left for that purpose: And in the after part of the same day John T. McKee informed the appellant that he had signed an agreement for the sale of the small triangle, according to the provisions of the deed or agreement from John T. McKee to the appellee, referred to in the bill and answer as exhibit A. The deed was prepared to be executed by John T. McKee and Bratton and wife, but was signed by the former only; and, taken in connection with a receipt given by John T. McKee to Barley of the 2d of December 1836, of the same date with the deed, for fifteen dollars, in part of the purchase money of a lot of land and other privileges bought of him and Bratton by the appellee, is evidence of a contract on the part of John T. McKee, acting for himself and professing to act for Bratton and wife, to sell to Barley a small triangle between Kerr's creek and a spring branch, containing, as appears by the survey made in this cause, 151.80 perches, with certain privileges set forth in the deed; amongst the others, the privilege of turning the water out of the main channel of Kerr's creek by means of a dam or otherwise, above a rock, (the corner on Kerr's creek,) through a race to be cut through said lot.

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The authority of John T. McKee to act as the agent of Bratton and wife in this transaction, though averred in the bill, is denied in the answers, and is not proved. There is nothing, therefore, which would bind Bratton and wife to execute the contract. But it is clear, as well from the deed of John T. McKee, which is valid as to him, though Bratton and wife did not execute it, and his receipt, as from the admissions in the answers of both the McKees, that the sale and purchase was not limited to John T. McKee's undivided moiety, but embraced the whole subject described in the deed. The deed itself, signed by John T. McKee, describes the land intended to be conveyed by metes and bounds; the receipt is for a part of the purchase money of the lot and other privileges sold to Barley; the answer of John T. McKee sets forth the negotiation as between himself alone and Barley, the execution of the deed A by him, and insists that Barley is entitled to nothing but what is provided for in the article: Thereby impliedly admitting that he is entitled by their contract to all the deed did profess to convey. This answer would not be evidence against the codefendants. But Samuel W. McKee, in his answer, admits he was informed by his father, on the day the contract was entered into, that he signed an agreement for the sale of this small triangle to Barley, and refers in his answer to the deed as showing the extent of Barley's rights. In fact, so far from controverting the right of the appellee as acquired by the contract, the appellant Samuel, in another part of his answer, states that if he had limited himself to the privileges granted thereby, he never would have complained. The lawless abuse of the privileges alleged to have been conferred by the contract is the principal ground upon which he objects to the appellee's claim to relief. It is manifest that whether John T. McKee was or was not the authorized agent of Bratton and wife, he un-

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dertook to sell and did sell to the appellee the whole subject described in the deed of the 2d of December 1836; and he, and those claiming under him, with full notice of his contract, are bound to comply with it, if it can be done without injury to the rights of the coparcener. The answer of the appellant shows he was fully apprised of the negotiation and sale, and the terms thereof; and the evidence proves that the appellee took possession of the lot of land purchased by him, and made use of it in the mode contemplated when he purchased, by opening a race through it.

It was said in *Robinett v. Preston*, 2 Rob. R. 277, that although a conveyance by one joint tenant of a part of the land might have no legal effect to the prejudice of the cotenant, yet it would be effectual to pass the interest of the grantor in the tract. And if, upon partition, the share assigned to the cotenant did not include the part conveyed, the cotenant would get all he was entitled to, and the grantor could not deny his deed. If, upon a partition, that part of the land described in this deed, or affected by the water privileges, had been assigned to John T. McKee, he would have been in a condition to have executed his contract, if he would not, in that event, have been estopped by his deed from disturbing his vendee; and his son, claiming under his subsequent conveyance, with full notice, can occupy no higher ground.

A court of equity, in making partition, would have respected the rights acquired by a fair purchaser, provided no injury was done thereby to the coparcener. In this case the interest sold was small in extent and of little value; the triangle containing less than an acre, and the whole interest conveyed was valued by the parties at thirty dollars. The coparcener could have had his full share allotted in the residue of the tract. As the conveyance of both the joint owners to the appellant Samuel has invested him with the legal

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title to the entire tract, he is now in a condition to perfect the title of the appellee, according to the terms of the contract, as evidenced by the deed of the 2d of December 1836, from John T. McKee, referred to as exhibit A. This is all the decree requires him to do, and I think it should be affirmed.

The other judges concurred in the opinion of *Allen, J.*

DECREE AFFIRMED.

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1. A deed of trust which, among other things, conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from its date, is not necessarily fraudulent as to creditors.
2. Though the deed be executed without the knowledge of the creditors secured by it, yet if when informed of its execution they assent to it, it is valid.
3. A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion. Nor will a suit be entertained to compel a trustee to exercise his power.
4. Testator directs the residue of his estate to be invested by his executors for the benefit of his son, and to pay over to him or his assigns annually the interest accruing thereon. But if his executors should judge, from proper information of his son's habits and steadiness, that it would be prudent to entrust him with the full management of the funds intended for his benefit, they are directed to turn over the whole into his hands. And by a codicil he gives the executors the same discretion over the interest of the fund as they had by the will over the principal. The executors having declared their judgment that the son had reformed and might be entrusted with the control of the fund, a court of equity will in such a case compel the executors to perform the trust by delivering over the fund to the son. And before it is done the son has such an interest in the fund that, upon taking the oath of an insolvent debtor, it will vest in the sheriff, and the creditor may subject it to the payment of his debt.

John Paris, late of the county of Augusta, died in 1839, having first made his will, which was duly admitted to probat. By his will he directed his executors to sell all his property, real and personal, except a few articles of household furniture, which he gave to his sister, Hannah Paris: And out of the proceeds he directed them to pay to his said sister two hundred dollars on account of her portion in her father's estate, for which she had a claim upon him.

And he further gave her the sum of three hundred dollars, which he directed his executors to loan out and pay her the interest; or, if they should think it better for her to have the control of the principal, they were directed to place it at her disposal.

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All the balance of the proceeds of his estate he directed his executors to lend out upon real security, for the benefit of his son John, and to pay over to him or his assigns annually the interest accruing thereon. But if his executors should judge, from proper information of his son's habits and steadiness, that it would be prudent to entrust him with the full management of the funds intended for his benefit, then he directed that they should turn over the whole into his hands. And he appointed Nicholas C. Kinney and Littleton Waddell executors, and also trustees to execute the provisions of his will in favor of his sister and son.

By a codicil the testator directed that his executors and trustees should have the same discretion over the interest of the fund he had given to his son as they had by the will over the principal. Both the will and codicil were dated on the 27th of October 1838.

At the time this will was made John Paris, jr., had left home, and was living in Louisiana. He was about nineteen years old, and had evinced a disposition to drinking, gaming and extravagance. He returned home a few months before his father's death, apparently reformed in his habits, and soon after married.

In November 1839 John Paris exhibited his bill in the Circuit court of Augusta against the executors and trustees, Kinney and Waddell, in which he set out the provisions of his father's will, and stated that the executors were about to sell all the property of the testator. He refers to his previous habits, and expresses the hope that he has amended them. He says he does not wish the substantial provisions of the will

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changed until he shall have conformed rigidly to all the provisions imposed by the wishes of his father; but that his inclinations and interest both prompt him to retain the farm on which his father lived in kind rather than to have it sold. And he prays that he may be allowed to elect to keep the land and personal property in lieu of the proceeds of it; that the executors may be directed not to sell it, but to hold it subject to the trusts of the will, permitting him to enjoy the profits of the property instead of the proceeds of the sale, and for general relief.

The executors answered the bill. After stating that they sold personal property enough to pay the legacy to the sister of the testator, and expressing the hope that the amendment in the conduct of the plaintiff may be permanent, they say they have no wish to thwart his views and wishes, or to exert any control in the management of his property, and are perfectly willing, if it can be done with safety to them, that the court shall permit him to elect to hold the land; and they submit the subject to the court.

The cause coming on to be heard upon the bill, the answer, and the will of John Paris, the court was of opinion that, taking into consideration the object of the testator, the reformation evinced by the son, and the future welfare of that son, it was highly expedient that he should, for the present at least, be indulged in his election to hold the land and personal property (except so far as might be necessary for the payment of debts) in kind: But that he should still hold it subject to the trust declared by the will, and subject to the power of the court to withdraw that indulgence, if, at any future day, such may seem to the court expedient; unless at some future day the court, with the assent of the executors, should deem it expedient to terminate the trust and invest him with the absolute legal estate. And it was decreed that the executors

forbear, until the further order of the court, to sell the real and personal estate in the bill and answer mentioned, except for the payment of debts and legacies.

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By deed bearing date the 30th of May 1842, and admitted to record on the same day, John Paris conveyed to Jacob K. Stribling all the interest of Paris in twenty-one acres of land which descended to his wife as one of the heirs of her father, that being his interest as tenant by the curtesy, three horses, one cow, two ploughs, one wheat screen, one bed, bedstead and furniture, plates, dishes, knives and forks, candlestick and snuffers, together with all other household and kitchen furniture belonging to the grantor; also all the crops of grain, including wheat, rye, corn and oats, then growing on the land whereon he lived; upon trust that Paris should be permitted to remain in possession of the property until the 30th of May 1844; and then if he made default in the payment of two debts thereby intended to be secured, one due to Hannah Paris for three hundred and fifteen dollars and fifty-two cents, and the other to David Fultz for seventy-five dollars, that upon the request of either of said creditors, the trustee should sell and pay said debts.

The Circuit court of Augusta county commenced its session on the 1st of June, and at that term of the court John Cochran, as assignee of Matthew Blair, recovered a judgment upon a single bill against John Paris for three hundred and eighty-nine dollars and thirty-four cents, with interest from March 1841 until paid. Upon this judgment execution against the body of Paris was sued out, and being taken in custody, he took the benefit of the act for the relief of insolvent debtors, surrendering in his schedule only his equity of redemption in the property conveyed in the aforementioned deed of trust.

In September 1842 Cochran instituted a suit in

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equity in the Circuit court of Augusta against Paris, the trustee and *cestuis que trust* in the deed, the executors and trustees in the will of John Paris, Blair and the sheriff. In his bill, after setting out the foregoing facts, he charged that the notes referred to in the deed were drawn in Staunton on the same day the deed was executed, in the absence certainly of Hannah Paris; that she was the aunt of Paris and lived in his family. That he was uninformed whether anything was due from John Paris to either Hannah Paris or Fultz, or whether they claimed under the deed. And he charged that the deed was executed to delay, hinder and defraud the creditors of Paris, and particularly the plaintiff. And he called upon John Paris, Hannah Paris and Fultz to say whether the two latter were consulted or apprised of the intention to make the deed of trust aforesaid.

The plaintiff further insisted that he was entitled to have the property bequeathed by John Paris, sen., for the benefit of his son, subjected to the payment of his debt. That the executors were willing to terminate the trust, being satisfied from the reformation of John Paris, jr., and his steadiness, that he was entitled under the will to the full control and management of the estate intended for his benefit. And he prayed that the deed of trust might be set aside as fraudulent and void as to creditors, and that the court would subject the property embraced in that deed, and also the interest of John Paris in the property bequeathed to him by his father, to satisfy the plaintiff's debt; and also for general relief.

John Paris, Hannah Paris and David Fultz answered the bill. John Paris denied that the deed of trust was intended to defraud his creditors. He stated the manner in which he became indebted to Hannah Paris, and the proofs sustained the answer. He said he had borrowed the money from her and promised to secure

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her by a deed of trust. That he could not say that Hannah Paris or Fultz knew of his intention to execute said deed of trust at the time it was done; but that on returning home he handed said Hannah his bond, and informed her that he had executed the trust deed to secure it, and that she at once elected to claim under the deed, received the bond, and expressed herself satisfied with the security: And that as soon as said Fultz heard of the deed he elected no claim under it. The answers of Hannah Paris and Fultz were to the same effect. John Paris further insisted that the trust of the will of his father still existed, and that the property bequeathed by his father was not liable to satisfy the plaintiff's debt.

The executors, Kinney and Waddell, were examined as witnesses. Kinney stated that the property bequeathed to John Paris by his father had been in his possession ever since the decree of the Circuit court, and had been enjoyed by him without the control of either of the trustees. So far as the witness was concerned as trustee, he had been willing, ever since the marriage of John Paris, to relinquish any control which the will gave him over the property as trustee, upon being indemnified against the debts and legacies due from the testator and under his will; as he considered that Paris had reformed, and believing that was the intention or wish of Paris' father. Waddell said that he exercised no control over any portion of the property since the decree of the Circuit court; and that he had been willing, after the payment of all debts and legacies due from the estate, to invest the defendant Paris with the full and legal title thereto. And he repeats, that his belief of the reformation of the habits of the said Paris would at all times have induced him, so far as he was concerned, to put the full control and management of the estate of the testator into his hands.

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When the cause came on to be heard, the court directed a commissioner to sell the property embraced in the deed of the 30th of May 1842; and his report showed that the net proceeds of sale were one hundred and ninety dollars and ninety cents. The court also directed a commissioner to take an account of the crops conveyed in the deed; and he estimated them at eighty-three dollars and seventy-five cents. Of this sum the corn and oats were estimated at forty dollars; and the commissioner reports that a witness examined before him stated that Paris had horses enough to eat up all the corn and oats.

The cause came on to be finally heard in June 1848, when the court held that the trust deed was *bona fide*, and not made to delay, hinder and defraud creditors; and the proceeds of sale of the trust property was directed to be paid to the *cestuis que trust*. And the court further held that until the executors and trustees should, in their discretion, (a discretion exclusively belonging to them, and not even controllable by the court,) see cause, in the execution of the purely discretionary power conferred upon them, to invest John Paris with the legal title to, and power and control over, the estate given by the will of his father, and thereby terminate the trust, the said John Paris could acquire no such interest or estate under said will as could be subjected by his creditors to the payment of their debts. And the bill was dismissed with costs. Whereupon Cochran applied to this court for an appeal, which was allowed.

Michie, for the appellant.

Stuart and R. P. Kinney, for the appellees.

DANIEL, *J.* The decree of the Circuit court, in so far as it sustains the deed of trust of the 30th of May 1842, is, I think, correct. The fact that a deed of

trust embraces articles which must perish or be consumed in the use, before a sale of them can be made according to the terms of the deed, is not one which, of itself, necessarily shows the deed to have been made with a fraudulent design. The amount, in number or value of such articles, may be so inconsiderable, as compared with the main subjects of the trust, as to justify the conclusion that they were embraced through inattention of the parties to the inconsistency of providing a security out of property which, from its nature, would necessarily perish before it could be made available as a means of satisfying the trust. Or the deed may embrace other property, to the improvement, support or sustenance of which such perishable property is essential; and in such last supposed case the fact that the perishable property is embraced in the deed, so far from being indicative of a fraudulent purpose, might rather serve to show an honest and a provident design and effort to make the main subjects of the trust a more certain and productive security. It would be but fair in such case to construe the deed in accordance with the probable design and motives of the parties, and to relieve it of any apparent inconsistency, by holding the provisions in regard to the continued possession and the sale of the property as intended to apply only to such of it as, from its nature, might reasonably be expected to be in existence at the day of sale.

The main objection to the deed is founded on the fact that it embraces growing crops of wheat, rye, corn and oats, which the bill alleges would be severed and consumed before the trustee would, under the provisions of the deed, be at liberty to execute the trust. It seems to me that it is a fair answer to this objection to say, that even if these crops were of such a nature that they could not be preserved till the day of sale, it would be harsh to construe the provision of the deed

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in relation to them as designed merely to cover them up from creditors ; seeing that the deed also embraces a number of horses and a cow, to the sustenance of which they would not, according to the testimony, probably be more than adequate. Besides, we have no proof that these crops are of such a nature as necessarily to perish before the day of sale : On the contrary, common observation and experience prove that they may be preserved, without material loss or deterioration, for a longer period.

There is, therefore, nothing on the face of the deed to show that the property conveyed was not designed by the parties to be a substantial and *bona fide* security for the debts, to secure the payment of which it was made.

It remains to be considered whether the appellee Paris had, at the date of his surrender, on taking the oath of an insolvent debtor, any such interest under his father's will, in the property sought to be subjected to the payment of the appellant's demand, as can, in equity, be so subjected.

A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control the trustees acting *bona fide* in the exercise of their discretion. Nor will a suit be entertained to compel the trustees to exercise their power. And the refusal of a trustee to exercise a purely discretionary power is not a breach of trust for which he can be removed from office, although the trustee assigns no conclusive reason for the refusal, and the proposed act is apparently beneficial to the trust estate. Hill on Trustees 715.

Again : On page 725 of the same treatise the author says, the fourth and last class of discretionary powers is where the discretion is to be exercised on matters of pure personal judgment. For instance, when the trustees are empowered to give their opi-

nion on the good or ill conduct or merits of an individual; or to determine the propriety or impropriety of continuing the payment of an annuity; or to give their approbation to a settlement. The trustees alone are competent to exercise these powers, for they may have private and peculiar grounds for arriving at a proper conclusion, into which the court could not providentially enquire, and which the trustee might refuse to disclose. The exercise of such authorities cannot, in general, be assumed or even controlled by the court. If, however, a trustee is actuated by fraudulent or improper motives in exercising or refusing to exercise his discretionary powers, a court of equity, upon proof of the improper conduct, interposes its jurisdiction on a totally different principle—not for the purpose of exercising the discretion committed to the trustee, but to check or relieve from the consequences of an improper exercise of that discretion. *Ibid.* 716.

If the rights of John Paris, the son, had been left by the will of his father dependent on the mere will or discretion of the trustees, to be exercised or not as they might please, without reference to the conduct of the son; or if the trustees had never expressed themselves satisfied of his reformation; or, on being called on to express their opinion as to his habits and steadiness, had either disclaimed doing so, or had said that from “proper information” they had formed the judgment that it would not be prudent to entrust him with the management of the estate intended for his benefit, it would have been difficult, in view of the foregoing authority, to find any ground on which the interference of a court of equity could have been justified. But I do not think that the will is to be so construed: And the course of the trustees has been exactly the reverse of that just supposed. The fifth clause of the will, after directing the funds arising from the sale of the property to be loaned out, and the interest to be paid

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over annually to the son, proceeds, "but should my executors judge, from proper information of my son's habits and steadiness, that it would be prudent to entrust him with the full management of the funds intended for his benefit, *then it is my will that they turn over the whole into his hands.*" Let it be that the executors are the sole judges whether the conduct of the son has been such as to render it prudent that he should be invested with the estate, and that no court has a right to correct their judgment, however erroneous it might be, yet when their judgment is formed and announced, and is in favor of turning over the estate, does there not arise a duty on their part to do so? Whenever the trustees, in the exercise of their judgment and discretion, have arrived at the conclusion that it is prudent the son should have the property intended for his benefit, free from their control, the testator says it is his will that he should so enjoy it. Is not any further holding by, or control over the property, on the part of the trustees, thenceforward in conflict with the mandatory language of the will? Suppose the will to have been in all respects as it is, with the exception that the "turning over of the estate into the hands of the son" had been made dependent on the approval of his conduct by persons other than the executors; would not the executors, upon being certified of such approval, have been bound at once to invest him with the title? And are the rights of the son, consequent on the approval of his conduct, modified by the fact that the persons who by the will are to judge of his conduct, and those who upon the approval of it are to turn over the property to him, are the same? It seems to me whenever the son shows that his conduct has met with the approbation of the executors, he does all which the testator intended he should do in order to entitle him to the free and uncontrolled enjoyment of the bounty in-

tended for him. This he has done. In their answer to the bill filed by him, and in their depositions taken in this cause, the executors express themselves satisfied of his reformation; and in the latter they say that such is their conviction on the subject, that they would, at all times since his marriage, have been willing to place the full control and management of the estate in his hands. Besides, they are parties to this suit, and have not denied the allegations of the bill. They have exercised their discretion and pronounced their judgment in the only matter which was left to their discretion. From the moment of their having done so the right or power in or over the estate intended for the testator's son remaining in them, call it by whatever name, became subject to the command, in the will, to turn it over to him, free from their control. They thenceforward became trustees of an estate, to the full and unrestricted enjoyment of which another is beneficially entitled under the provisions of the instrument whence all their powers are derived.

The executors, in their answer to the bill filed by the appellee Paris, having admitted his reformation, he had, I think, a right to insist on a decree directing them to convey to him the legal title to the property held by them for his benefit. The *decree* which was rendered neither affirmed nor denied that right. It is true that the court then expressed the *opinion*, which it has carried out in the decree rendered in this cause, viz: that it was a matter resting entirely in the discretion of the executors, (notwithstanding the reformation of Paris and their approval of his conduct,) whether they would invest him with the legal title to the estate. Yet the *decree* went no further than to stay the sale of the property, except so far as might be necessary for the payment of debts and legacies. The waiver for the present by Paris of a decree direct-

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ing the executors to convey the title did not, I think, conclude his rights, nor deprive him of the power, at any time thereafter, to ask for and insist upon such a decree. The executors still remained clothed with the legal title; but they still stood, as they had always stood, ever since they had announced their judgment of approval of the conduct of Paris, simply as trustees, bound by the requirements of the will, and *in foro conscientiæ*, to invest him with the title and control of the estate. In this state of things he took the benefit of the insolvent debtors' oath, and whatever right he had passed to the sheriff for the benefit of his creditor, the appellant. In asking the court to subject the property to the satisfaction of his demand, the appellant, it seems to me, seeks no interference with the exercise of any discretion with which the trustees are clothed by the will. He, in effect, only asks the court to declare, what they have admitted and still admit, that the condition on which they were to convey the estate has been complied with, and to announce the conclusion which follows, that it stands, in equity, freed from their control, and subject to the contracts and engagements of the beneficiary. The case is a peculiar one, and counsel have not furnished us with any precedents, nor have I been able to find any which would seem to rule it. The definition of powers and trusts, as given in the authorities, may be sufficiently plain, yet it often becomes a difficult task, in construing the language of an instrument, to determine whether it confers a mere power or a power in the nature of a trust, and, consequently, whether the power is one over the exercise of which a court of equity can take any control. When the executors are clothed with an arbitrary discretion, an absolute power to appoint or withhold the bounty, as in *Pink & others v. De Thuissey*, 2 Madd. R. 423, where the executor was left at liberty to give to the legatee one thousand pounds, "*if he found the thing*

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proper," or, as in the case of *Weller v. Weller*, (cited in the foregoing case as having been decided at the rolls,) where the testator gave his son, who had been extravagant, a sum of money, with a power to the executors to advance more "*if they thought proper*," the courts have, I think, very properly refused to decide upon the propriety of the executor's withholding the legacy, holding that to do so would be to assume an authority confided solely to the discretion of the executors. But in a case like this, where the judgment and discretion of the executors are limited and directed to a specified enquiry, the reformation of the conduct of the legatee, and where, in the event of such judgment being favorable, the will imperatively requires the executors to hand over the legacy; where the executors have exercised their judgment and discretion, have declared themselves satisfied with the result, and have admitted their willingness to hand over the estate; where a refusal on their part to execute the power could be from no motive connected with the conduct of the beneficiary, but would be directly in conflict with their own convictions of right and their own views of the intention of the testator; it seems to me that a claim to the interposition of a court of equity is presented, which it cannot reject without violating the principles which usually govern its action; that the executors stand before the court, not in the attitude of persons clothed with a mere power, but as charged with an acknowledged trust or duty, which, in equity and good conscience, they are bound to perform.

The only person here making opposition to the performance of this duty is the beneficiary, the appellee Paris. Without stopping to comment on the unenviable attitude in which he has placed himself before the court, it is obvious to remark that no desire of his that a power over the estate shall remain in the executors can prejudicially affect the rights of the appellant.

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Regarding that power as one in the nature of a trust, which the executors, at the date of the surrender by Paris, stood bound to perform, I think that he then had such an interest in the estate as could pass for the benefit of his creditor, and that the latter has a right to have it subjected to the payment of his demand.

I am, therefore, of opinion to reverse the decree of the Circuit court, and to render, instead thereof, a decree dismissing the bill so far as it seeks to invalidate the deed of trust; and remanding the cause, in order that the interest of Paris in his father's estate may, after a settlement of the proper accounts, be subjected to the satisfaction of the appellant's debt.

The other judges concurred in the opinion of *Daniel, J.*

The decree was as follows :

The court is of opinion, that the deed of trust of the 30th of May 1842 is *bona fide*, and not made to delay, hinder or defraud creditors; and is, therefore, valid against the claim of the appellant. The court is further of opinion, that the appellee, John Paris, by virtue of the power conferred upon the executors by the will of John Paris the elder, and the action of the executors under it, acquired, and held, at the date of his surrender as an insolvent debtor, at the suit of the appellant, an interest in the estate of his father, which passed by said surrender to the sheriff of Augusta county, and which ought to be subjected to the payment of the appellant's debt. So much of the decree as dismisses the bill as to the appellee Fultz, and orders the proceeds of the sale of the trust property to be paid to the parties entitled under the trust deed, is, therefore, affirmed; and so much of the decree as denies the appellant's right to have satisfaction of his debt out of the interest of the appellee Paris in his

father's estate, is reversed, with costs to the appellant as against the appellee Paris. And this cause is remanded to the Circuit court, in order that the accounts of the executors may be settled, and that the debt of the appellant may be satisfied by a sale of the tract of land of one hundred and fifteen acres, in the bill and proceedings mentioned, if a resort thereto shall become necessary.

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Testator by his will gave to his wife a plantation, slaves, stock, &c., for life. And he then added, "It is understood that my wife is to keep my children and raise them, and give them sufficient schooling." HELD:

1. The widow takes the bequest *cum onere*, and is bound to provide for the support and education of the children in a manner suited to her circumstances.
2. But if one of the children accepts the invitation of a relation to visit her, and remains with her for years, the widow of the testator being willing to keep the child with her and provide for her, the widow is not liable for the expenses of the child for board, clothing or education; and this though the relation with whom the child lives is a married woman, and her husband, at the end of the time, claims compensation.
3. The executors of the testator having paid the account out of the estate of the child in their hands, and upon her marriage her husband having given a receipt to the executors for the amount, he and his wife cannot recover the amount from the widow.
4. A bill is filed by the husband and his wife against the executors and widow for a settlement of their administration accounts, and to recover from the widow the amount of these expenses; the account is ordered, and the commissioner allows the executors a credit for the amount they had paid for the wife, and reports a small balance in their favor. This report is returned in March 1824, and not excepted to; and the case lies from that time until June 1847, when the executors and widow are dead. It is too late for the plaintiff to revive the suit, and ask to have the report recommitted and reformed.

In the year 1810 Robert Crawford, of Augusta county, departed this life, having first made his will, which was duly admitted to probat; and John and William Poage qualified as his executors. By his will he gave to his wife the negroes and all other property which had been hers before their marriage; and he

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gave to her, during her life, the plantation whereon he lived, two negroes, stock, plantation utensils and household furniture: And then added, "It is understood that my wife is to keep my children and raise them, and give them sufficient schooling." The balance of his estate he directed to be sold and divided among eight of his children.

At the time of Crawford's death one of his children had received his share of his father's estate, and another was married; and the other seven lived at home, their ages ranging from four to seventeen years. The property thus left to Mrs. Crawford, it was estimated, would have rented for between three and four hundred dollars.

About the year 1813 Jane, one of the children of Robert Crawford by a former wife, being about thirteen years old, went on a visit to the house of James Bell, whose wife was her aunt; and she remained there three years. She then lived with her uncle, James Craig, for a year; and then married John C. Patterson. For her expenses of clothing and schooling, and some advancements of money, James Bell presented to the executors of Robert Crawford an account for one hundred and fifty-one pounds nine shillings and a penny, which was paid by the executors; and after her marriage, Patterson, in August 1818, executed to them a receipt for this sum, as in part of her proportion of her father's estate. In September of the same year the executors paid him in money one thousand one hundred and forty-six dollars and fifty cents, on account of her interest in said estate.

In September 1821 John C. Patterson and his wife instituted a suit in the late Staunton chancery court against the executors, Mrs. Crawford and the other residuary legatees; and in their bill, after setting out the provisions of the will of Robert Crawford, they charged that the executors had received into their

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hands a considerable estate, which they had sold ; and that they had made no settlement of their account or distribution of the estate which had come to their hands. They further charged that the female plaintiff had lived with her step mother only a part of the time between her father's death and her own marriage, and had not received that support and education provided for by the will. On the contrary, the executor, John Poage, had raised an account against her of one hundred and fifty-one pounds nine shilling and a penny, embracing nothing but those expenditures which her step mother was bound by the will to have defrayed, and that shortly after her marriage he had presented the account to Patterson and obtained his receipt therefor as a part of the estate to which she was entitled under the will of her father : And they file the account, marked B. They allege that they were then ignorant of the propriety of these charges ; but had since been advised that they were not bound to pay the account ; the whole of it being justly chargeable to the widow. The prayer of the bill is for a settlement of the accounts of the executors ; that the receipt aforesaid may be canceled and recalled, or that the widow may be compelled to pay the amount thereof with interest to the plaintiffs ; that they may have a decree for so much of said estate as they are entitled to ; and for general relief.

The executors answered the bill, admitting the sale of the property by them, stating that John Poage was the acting executor, and that he had paid out from time to time, to such of the devisees as were of age, as much as he conceived it would be prudent to pay until a settlement of the estate could be had. That they were always willing to make this settlement, but it was not until about the commencement of this suit that guardians had been appointed for all the infants ; and that they were then willing to settle their accounts.

John Poage stated that he advanced the money charged in the account exhibited with the bill, under the belief that it was in discharge of the interest of the female plaintiff in her father's estate; and under this belief he required and obtained the receipt from her husband.

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Mrs. Crawford alleged that she had strictly complied with the provisions of the will in favor of the female plaintiff as long as she lived with her, which was until she was between fourteen and fifteen years of age. That she then left the defendant's house, and went to live with her aunt, Mrs. Bell, at Mrs. Bell's solicitation, who proposed to take her, as defendant believed through friendship, to do more for her than the defendant would have in her power to do. That defendant consented, believing it would be of advantage to the plaintiff, and not from any unwillingness in herself to comply with the provisions of the will aforesaid. And she insisted that the moneys expended whilst at Mrs. Bell's could not be considered as embraced by the provisions of the will; but was properly chargeable against plaintiff's interest in the estate.

In June 1823 the death of the plaintiff, John C. Patterson, was suggested, and on the motion of the surviving plaintiff, it was ordered that the executors of Robert Crawford do render an account of their administration before a commissioner of the court. In March 1824 this commissioner filed his report, in which he credited the executors, in their account with the plaintiff, with the amount they had paid; and she was brought in debt thirty-eight dollars and thirty cents. Some of the other children were over paid, and there were balances due to others.

After the return of this report the cause slept, without a step being taken therein, until June 1847, when the death of John Poage and Sarah Crawford were suggested, and it was ordered to be revived in the

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names of Poage's executors and of Silas Henton, as executor of Sarah Crawford. The death of several of the legatees of Robert Crawford was also suggested, and the suit was revived in the names of their personal representatives; and then the record states that by consent it is ordered that the report of Commissioner Clarke theretofore made in the cause be recommended to Commissioner Hendren, who is required to consider and modify the same, and to report specially to the court any matter, &c.

In October following Commissioner Hendren returned his report, in which he disallowed the credits to the executors for money paid to Bell, to the amount of one hundred and thirteen pounds eleven shillings, on the ground that it was money expended for necessities during her infancy, and therefore properly chargeable to the widow. And he reported a balance due to the plaintiff of four hundred and fifty-five dollars and ninety-nine cents, with interest from June the 30th, 1821. This was the only account stated by the commissioner. The cause came on to be heard upon this report in August 1848, when the court made a decree directing Henton, the executor of Mrs. Crawford, to pay to the plaintiff, out of the assets of his testatrix, the amount reported by the commissioner; with liberty to the plaintiff, if this decree should be unavailing, to apply for a decree against the executors of Robert Crawford.

Soon after this decree was pronounced Henton presented a petition to the court, in which he stated that the cause had been revived without his knowledge or consent, and that the decree had been made without his having had an opportunity to make his defence; and he verily believed he should be able to show that it was erroneous. The court accordingly set aside the decree; and the cause was recommitted to Commissioner Hendren, who was directed to state the accounts

between the parties according to his own view of what was equitable: And Henton was allowed to file his answer. In his answer, after stating the proceedings in the cause up to the report of Commissioner Clarke, he alleged that Chancellor Taylor considered the cause, and filed a memorandum in his own handwriting, among the papers, in the following words: "The report not being excepted to, is affirmed, and a decree to be entered in pursuance thereof"; but that no decree was entered on the order book. That thus the cause rested for more than twenty years, until John Poage, the principal acting executor, who was cognizant of all the facts of the case, and Sarah Crawford, the widow, had gone down to their graves in the firm conviction that this stale demand had been finally adjusted. He insisted upon the objections taken by the original defendants; upon the staleness of the demand, and upon the statute of limitations; upon the report of Clarke, made when all the parties were alive, and on the acquiescence by the plaintiff for twenty-five years in that report; on the subsequent death of all the parties who were personally cognizant of the transactions; and upon the manifest injustice of compelling him, ignorant of all the matters, to enter into a controversy which seemed to have been carefully kept out of view during the time of his testatrix.

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In September 1849 Commissioner Hendren made his second report, in which he charged Mrs. Crawford with the annual sum of forty dollars for five years, with interest commencing with the year 1814, and coming down to 1818; and making the balance due upon the account, on the 1st of November 1849, six hundred and six dollars and sixty-six cents, of which two hundred and twenty-four dollars and sixty-nine cents was principal. The plaintiff excepted to the report, because it reduced the charges below the amount paid by the executors to Bell.

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The cause came on to be finally heard in November 1849, when the court overruled the plaintiff's exceptions and confirmed the report; and decreed that Henton, the executor of Mrs. Crawford, should, out of the assets of his testatrix in his hands, pay to the plaintiff the amount reported by the commissioner, with interest on the principal sum due, from the 1st of November 1849 until paid, and her costs. And liberty was reserved to the plaintiff to apply for a decree against the executors, if this decree should be unproductive. From this decree Mrs. Crawford's executor applied to this court for an appeal, which was allowed.

Stuart, for the appellant.

Michie, for the appellee.

MONCURE, *J.* The will of Robert Crawford imposed a charge on the estate given to his wife for the keeping, raising and schooling of his children. The estate was of the annual value of three or four hundred dollars; and seems to have been not more than adequate to the support of the family in a plain and comfortable manner. At the testator's death the family consisted, besides the widow, of seven children, ranging from four to seventeen years of age. The widow having accepted the estate, took it of course *cum onere*; and was bound to keep and raise the children, and give them sufficient schooling. Had she turned the appellee away from home when of tender years, and unable to provide for herself, and failed to provide her with necessary board, clothes and schooling, she would have been liable, in equity at least, if not at law, for the value of such necessities to any person who might furnish or pay for them. But she did not turn the appellee away. She kept her until she was thirteen years of age, when the appellee went to live with her aunt, Mrs. Bell, by the

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latter's invitation, and continued to live there for three or four years, and she then lived with her aunt, Mrs. Craig, for a year or more, until her marriage. The widow, as she alleges in her answer, would have continued to keep the appellee, according to the terms of the will; but she believed, and was well warranted in believing, that it would be for the advantage of the appellee to live with her aunt, and that she would be better provided for there than at home, and free of charge. The account which was the cause of this suit, being exhibit B filed with the bill, is for cash paid by the executor, John Poage, to and for the appellee while she lived with Mrs. Bell and Mrs. Craig; a large part of it having been paid to James Bell, the husband of the former. It was not created at the instance of the widow, or on her credit, and she never assumed its payment. It does not appear to have been ever demanded of her, or that she was ever informed of its existence, until the institution of this suit. She was therefore never liable for the amount of the account, or any part of it, at law or in equity, either by reason of the charge created by the will of her husband, or by any contract, express or implied. The case, in principle, is very much like that of *Urmston v. Newcomen*, 4 Adol. & Ell. 899, 31 Eng. C. L. R. 222. There, a grand mother offered to a father to take care of his child without putting him to any expense; upon which he gave up the child to her. Afterwards the grand mother gave up the child to the mother, who was living apart from the father; and afterwards the child, to escape cruel treatment, returned to the grand mother, who maintained it thenceforward. In the argument of the case, (which was an action of *assumpsit* brought by the grand mother against the father to recover the expense of maintenance after the return of the child,) the general question was raised, Whether a father, if he desert his child, be not liable in *assumpsit*

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to any one who provides food and clothing for it? The judges declined giving an opinion upon the general question, thinking that it did not arise in the case. But they all concurred in deciding that the father, who had no notice of the child's quitting the grand mother at all, or of the cruelty, was not liable to her for the maintenance, in as much as the facts did not show any desertion of the child by the father, and negatived a contract between him and the grand mother. They also decided that it made no difference that the grand mother, when she made the original undertaking, was a married woman; the ground of the decision being not that she had made a valid contract, but that the circumstances negatived desertion; and that therefore the question as to the implied liability did not arise.

The widow, in this case, not being liable originally for the account, or any part of it, cannot be rendered liable to the executor, John Poage, in consequence of its payment by him, nor to the appellee in consequence of its payment by her husband to the said executor; neither of such payments having been made at the request of the widow, express or implied.

But even if she were ever liable for this account, or any part of it, or any of the expenses of the appellee while she lived with her aunts, such liability had ceased to exist in June 1847, when the suit was revived against the appellant as executor. The widow answered the bill in June 1822, stating the facts, and denying her liability. In June 1823 an order was made for the settlement of the account of the executors of Robert Crawford. In March 1824 the commissioner's report was returned, showing a balance due by the plaintiffs, Patterson and wife, to the executors, on the 30th of June 1821, of thirty-eight dollars and thirty and seven-eighth cents, after charging the former with the amount of the said account marked exhibit B, which charge the commissioner stated that

he conceived to be justified by the answers of the executors and of the widow. There was no exception to this report. In May 1824 the cause was set for hearing: And no further order was taken in it until June 1847; when the widow, the acting executor, and several of the other parties having died, the cause was revived and proceeded in to a final decree, which was rendered in November 1849. I think that the bill should have been dismissed as to the appellant, not only on the grounds of defence relied on in the answer of the widow, but also on the additional grounds relied on in the answer of the appellant, her executor, filed in December 1848, to wit, the staleness of the demand and the statute of limitations, and the acquiescence of the appellee in the report of the commissioner for more than twenty years, and until after the death of all the parties who were personally cognizant of the transactions. The death of the plaintiff John C. Patterson, was suggested in June 1823, and the suit was thereafter prosecuted in the name of his surviving wife, the appellee, who has ever since been free from legal disability. Her extraordinary *laches* in the prosecution of the suit has not been sufficiently accounted for. The only excuse relied on is furnished by a statement made in the answer of the appellant, that in consequence of a paralysis with which Chancellor Brown was afflicted about the time the commissioner made his report, and which in a great measure disabled him from attending to business, no action was taken by the court on the report; and that Chancellor Taylor, who succeeded Chancellor Brown in 1826, was, for some years before his transfer to the Botetourt circuit, almost incapable, from indisposition, of attending to his official duties. But this excuse accounts for comparatively a small portion of the long lapse of time between the return of the report and the revival of the suit, and is wholly insufficient.

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The fair presumption from the record is that all the parties acquiesced in the report, and did not choose to prosecute the case any farther; especially the appellee, who appeared by the report to be a debtor. This presumption is confirmed by the fact, also stated in the answer of the appellant, and admitted to be true by the counsel for the appellee, that after Chancellor Taylor came into office, but at what precise period does not appear, he filed in the papers a memorandum in the following words: "The report, not being excepted to, is affirmed, and a decree to be entered in pursuance thereof." Though such a decree was never actually entered, yet the rights of the parties seem to have been considered as settled by the report, sanctioned as it was by the chancellor. The further prosecution of the suit having been delayed for twenty-three years, and until after the death of the widow and of the acting executor, who were acquainted with the transactions, it was too late then to revive it against their representatives, who were ignorant of them, and had not the means of making a proper defence. The case falls within the principle of the cases of *Hercy v. Dinwoody*, 2 Ves. jr. 87, and *Hayes v. Goode*, 7 Leigh 452; that in a court of equity it is not only required that claims should be brought forward in a reasonable time, but also that they shall be prosecuted with reasonable diligence.

I think the bill should have been dismissed, not only as to the appellant, but as to the other defendants also; and on the principle of the cases just cited. The executors of Robert Crawford had certainly no right as such to make the payments charged in exhibit B; and John C. Patterson was not bound to have given them credit for the amount in the settlement of his wife's portion of their testator's estate. He did, however, give them a receipt therefor as so much of the said portion. Whether the receipt was given under

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such mistake of law or fact, or whether the relations between them were such as to have entitled him to set aside the transaction if due diligence had been used in the prosecution of the suit, are questions which it is unnecessary to decide.

That the suit was not prosecuted with due diligence has already been sufficiently shown. It may be said that none of the defendants have appealed from the decree except the appellant. But I think his appeal brings up the whole case, on the ground that the reversal of the decree and dismissal of the bill as to him would, directly or incidentally, disturb the rights of the other defendants as settled by the decree. See *Dickenson v. Davis*, 2 Leigh 401, and the opinion of Stanard, J., in *Powell's ex'ors v. White*, 11 Leigh 309, 317. The decree was, primarily, against the appellant; but liberty was reserved to the appellee, if the decree against the appellant should prove unavailing, to apply for further relief against the executors of Robert Crawford, or any other person liable in the premises, either primarily or eventually. The executors, if they could appeal from such a decree, may not have thought it necessary to do so, as it was primarily against the appellant, and would probably have been effectual but for his appeal. The reversal of the decree and dismissal of the bill as to him, therefore, would materially disturb their rights as settled by the decree, if in fact it settled anything as to them. But the reservation is a mere incident of the decree, and the reversal of the decree would leave nothing to sustain the incidental reservation. The same may be said of the liberty reserved to the other residuary legatees of Robert Crawford to apply for decrees upon the report, although the court was of opinion, and rightly so, that they had been satisfied. Patterson and wife were the only plaintiffs in the suit, and it is obvious they never would have brought it but for the purpose

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of recovering, the amount of the account for which he had given a receipt to the executors. None of the other residuary legatees have ever complained of the executors, or asked for any decree against them. The report of the commissioner, returned in 1824, showed that payments had been made by the executors to all of them, in regard to some exceeding, and to others falling short of, their respective portions of the estate. After the return of that report the executors proceeded to settle with the legatees accordingly; and receipts in full of several of the balances have actually been filed in the papers of the suit. In consideration of all the circumstances, and especially of the great lapse of time, I think no such reservation should have been made in favor of the other residuary legatees.

I am therefore of opinion that the decree should be reversed and the bill dismissed, with costs to the appellant, both in this court and the Circuit court.

The other judges concurred in the opinion of *Moncure, J.*

DECREE REVERSED.

Lewisburg.**McDOWELL'S *ex'or* v. CRAWFORD.**

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1. In an action of debt upon a bond for two thousand dollars, purporting to be for money loaned, the issue is made up upon the plea of *non est factum*. On the trial the plaintiff introduces ten intelligent and credible witnesses, well acquainted with the handwriting of the obligor, all of whom express a confident opinion that the signature to the bond is his. The defendant, to support his plea, introduces evidence of the circumstances of the obligor, the relations and conduct of the parties, and the ability of the plaintiff to lend the money. To rebut the evidence on the last ground the plaintiff, who was a merchant, introduced a witness C, who had been his book keeper, who professed to speak from memoranda taken by him on a recent examination of the plaintiff's books; and he stated that the plaintiff had a large amount of cash-notes and accounts not known to the defendant's witnesses, and that he had the control of a large estate of S, of which he was the executor. When the cross examination of this witness, and the examination of witnesses to rebut his testimony, was ended, which was late in the evening, the defendant's counsel announced that they had no other witnesses to examine, but would on the next day introduce some documentary testimony. On the next day they offered in evidence the settled accounts of the plaintiff as executor of S, to show that he could not have from that source, united with his own means, sufficient to enable him to make the loan. To this evidence the plaintiff objected, and the court excluded it; and in doing so, remarked that the evidence previously introduced by the defendant without objection, as well as that then offered, was too vague, remote and indefinite in its character to sustain the plea of *non est factum* against such evidence of *factum* as the plaintiff had introduced; and would have been excluded if objected to. The defendant then asked that the witness C might be recalled, and that they might be permitted to re-examine him, and test the accuracy of his statements, by requiring the production of the books, which were near and might be obtained in a few minutes. But the court refused to permit the witness to be recalled, or to require the books to be produced; because the evidence was irrelevant, and because the defendants had announced on the day before that they had concluded the examination of witnesses. **HELD:**

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1. The settlements of the plaintiff as executor of S were competent and relevant testimony, and should have been admitted.
2. That the comment of the court upon the evidence of the defendant, when excluding the settlements, was the expression of an opinion upon the weight of evidence calculated to mislead the jury, for which the verdict and judgment should be set aside, and a new trial awarded.
3. That the defendant should have been permitted, under the circumstances, to recall the witness C; and to have the plaintiff's books produced.
2. A note of the defendant to the plaintiff, written and delivered some days before the trial, authorizing the plaintiff to introduce his books in evidence, if he will allow them to be examined by defendant's counsel previous to the trial, is not admissible evidence for any purpose.

This was an action of debt in the Circuit court of Augusta county, brought by Hugh John Crawford against the executor of John McDowell deceased. The action was founded upon a bond; and the plea was *non est factum*, upon which the issue was made up.

Upon the trial the plaintiff introduced in evidence a bond in the following terms:

"2,000. One day after date, I promise to pay, or cause to be paid, unto Hugh J. Crawford or order, two thousand dollars, for borrowed money, with legal interest from date; to which payment, well and truly to be made, I bind myself, my heirs, administrators, executors, &c. Witness my hand and seal this the 18th day of March 1846.

"In consequence of not giving to said Crawford, at this time, a trust deed to secure the above two thousand dollars, which would give publicity to this debt, and be prejudicial to my interest, I agree to execute to him a valid deed of trust upon all my real estate in Staunton, at the expiration of three years from date, for which time I am to have the use of the money, if I should fail to pay him, his heirs, &c., the above sum within thirty days after payment is demanded.

JOHN McDOWELL. [Seal.]"

This bond was wholly in the handwriting of the plaintiff, except the signature; and there were two endorsements upon it, also in the handwriting of the plaintiff, of the receipt of the interest for 1847 and 1848. The plaintiff then introduced ten witnesses of intelligence, good character, and unquestioned and unquestionable credibility, consisting of clerks, lawyers, magistrates, merchants, a commissioner in chancery, and the family physician of the obligor, all of them familiar and well acquainted with the handwriting of the obligor, and whose acquaintance and intimacy varied with the different witnesses from twenty-five to forty years. These ten witnesses with one accord testified that they had been long and familiarly acquainted with the handwriting of John McDowell, from having seen him write, and from correspondence and business transactions with him; that they had carefully examined the signature to the bond in question, and they believed it to be the true and genuine signature of John McDowell. Several of these witnesses stated that the signature is written "with a lighter pen" than the common signature of John McDowell, but that in the general character of the writing, and in the formation of the letters, it has every appearance of being genuine. The plaintiff also introduced two receipts in his own handwriting, corresponding with the endorsements on the bond, for the interest for the years 1847 and 1848, and also introduced the deposition of a sister of McDowell, who was one of his heirs at law and a legatee in his will, and the evidence of another witness, showing how and when the receipts were found in the house in which McDowell had lived and where he died.

The defendant, to support the issue on his part, without offering any opposing testimony as to the genuineness of the signature to the bond, proceeded, by cross examination of the plaintiff's witnesses, and

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by witnesses on his own part, to offer evidence tending to show :

1. That the existence of the bond in controversy had been concealed, during the life time of John McDowell, in a manner and under circumstances in themselves unnatural, and wholly inconsistent with the habits of McDowell, and with the interest of the plaintiff.

2. That the plaintiff had not the pecuniary ability to make a loan of the amount and character evidenced by the bond in controversy, and that he could not, at the date of the bond, have had such an amount of money for any purpose.

3. That from the social and business relations of the plaintiff and John McDowell, it was altogether improbable that such a transaction could have taken place between them.

4. That from the pecuniary circumstances and standing of John McDowell at the date of the bond, it is altogether improbable that any one would have loaned him such a sum of money without security.

5. That the transaction, as appearing on the face of the bond, was altogether inconsistent with the known circumstances, habits and character of the parties at the date of the bond ; and that the subsequent conduct of both was inconsistent with the idea that such a contract had ever been made. That therefore it was not the act and deed of John McDowell, either because it was not his genuine signature, notwithstanding the plaintiff's evidence of handwriting ; or, if genuine, it was obtained surreptitiously, fraudulently or otherwise, in such an illegal manner as to render the bond not his act and deed.

The evidence introduced by the defendant to sustain the foregoing conclusions is set out in the record, but need not be stated here.

To rebut the evidence of the defendant as to the

pecuniary condition of the plaintiff at the date of the bond, he introduced a witness, William B. Crawford, who testified that he was, up to the — day of November 1845, book keeper for the plaintiff in his mercantile establishment; and that at that time plaintiff was in possession of a large amount of cash-notes and accounts, of his own property, which had not been known to any of the witnesses who testified as to his circumstances; and also that the plaintiff had the control of a large estate of John C. Sowers deceased, of which he was the executor. The witness professed to speak from memoranda taken upon a recent examination of the books kept by him in 1845.

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To meet this new evidence of the plaintiff, the defendant offered evidence of book keepers expert in the business, to show that the books described by the witness could not have enabled him to state such results with any certainty.

It being late in the evening when this evidence was given and finished, defendant's counsel announced that they had no other witnesses to examine, but that next morning they would probably offer documentary evidence; and the court adjourned with the announcement that any such evidence, provided it could be shown to be relevant to the issue, would be received.

On the next day the defendant offered to introduce the settlements made by the plaintiff of his accounts as executor of John C. Sowers deceased, to show that, at the date of the bond in controversy, the plaintiff could not have had funds of that estate in his hands sufficient of themselves, or with his own means, to have enabled him to make such a loan as that shown by the bond; and also to show that the plaintiff, as legatee and devisee of that estate, and deriving his whole property from that source, could not possibly have had the amount of available funds stated by his witness, William B. Crawford. To the introduction of

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these settlements as evidence, the plaintiff's counsel objected as irrelevant to the issue in the cause; and the court, sustaining the objection, refused to permit them to go to the jury.

In delivering the opinion excluding the evidence, the court stated that upon the issue in this cause, the plaintiff having introduced ten witnesses, all of whom swore positively to the genuineness of the signature to the bond, it was sufficient evidence, the bond being found in possession of the plaintiff, from which the jury should presume sealing and delivery, and due execution thereof, unless met and overthrown by opposing testimony on the part of the defendant; and that as the defendant had failed to introduce any opposing proof as to the genuineness of the signature, all the other testimony introduced by him without objection, as well as that now objected to, was too vague, remote and indefinite in its character to sustain the plea of *non est factum* against such evidence of *factum* as the plaintiff had introduced, and would have been excluded if objected to; but as it was not, all the court could do was to exclude that now objected to.

Upon this statement of the court the counsel for the plaintiff remarked that they had considered the whole of the defendant's evidence illegal, but had not objected to it because they wished to permit the fullest investigation. The counsel for the defendant then suggested to the court and the counsel for the plaintiff, that if the evidence should then be excluded in accordance with the opinion of the court, the defendant would at once except and submit to a verdict; but plaintiff's counsel refused to make a motion to exclude any part of defendant's evidence which had already gone to the jury, only objecting to the further introduction of illegal evidence by the defendant. The court stated its inability to exclude without such a motion, and declined to instruct the jury in conformity with the

opinion stated ; but upon the motion of the defendant, before the jury retired to consider of their verdict, instructed the jury as follows :

1. " The jury are bound to weigh and consider all testimony introduced by either party without objection, unless, upon a motion made to the court, such evidence is excluded."

2. " That upon the issue in this cause, it is competent for the defendant to show, by evidence as to the circumstances, relations and business of the parties, and by their whole conduct in connection with the bond in controversy, that it is either impossible or improbable that the bond sued upon is the act and deed of the defendant's testator": Remarking "that the instructions were clearly correct as abstract propositions of law, and that it might be safely left to the jury to determine how far they were applicable to the facts and evidence in the cause." To which action of the court excluding the testimony offered, and the opinion of the court pronounced concerning the evidence already introduced by the defendant, he excepted.

Immediately after the court had excluded the evidence as before stated, the defendant's counsel asked that William B. Crawford, the plaintiff's witness, might be recalled, and that they might be permitted to re-examine him, and test the accuracy of his statements as to the facts appearing upon the books of the plaintiff, by requiring the production of the books, which were near and might be obtained in a few minutes. But the court refused to permit the witness to be recalled, or to require the books to be produced, for two reasons: 1. Because the evidence would not be relevant to the issue. 2. That the defendant's counsel had, on the evening before, announced that they had concluded the examination of witnesses, as before stated. And the defendant again excepted.

Pending the trial the defendant offered in evidence

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a paper signed by himself, in which he expressed his consent to the production and use as evidence, on the trial, of the mercantile books of the plaintiff, provided they were at once put into the hands of his counsel for examination: And he proposed to show, that during the then term of the court, and some four days before the trial commenced, that paper had been presented by the defendant in open court, and filed in the cause; and that the plaintiff had refused or failed to avail himself of the privilege therein offered him; but at the same time had notified the defendant that if he really wished the production of the plaintiff's books, to say so distinctly, and they should be forthcoming without even requiring of the defendant the regular written notice, verified by affidavit. But the court excluded the paper and the evidence; and the defendant again excepted.

The jury found a verdict in favor of the plaintiff for the amount of the bond with interest; and the court rendered a judgment thereon. Whereupon the defendant applied to this court for a *supersedeas*, which was awarded.

Baldwin and *Michie*, for the appellant, referred to *Sides v. Schnebly*, 3 Har. & McH. 243; *Rowt's adm'r v. Kile's adm'r*, 1 Leigh 216; *West's ex'or v. Logwood*, 6 Munf. 491; *Bogle, &c., v. Sullivan*, 1 Call 561.

Fultz, for the appellee, referred to *Dale v. Roosevelt*, 9 Cow. R. 307; 3 Philips' Evi. 612; *Boyt v. Cooper*, 2 Murph. R. 286; *Tomlinson v. Mason*, 6 Rand. 169; *Gardner v. Gardner*, 10 John. R. 47.

SAMUELS, J. In my opinion it appears with sufficient clearness that the account of Crawford's administration on the estate of John C. Sowers, and the books of Crawford, respectively, afforded evidence rel-

evant to the issue, and were therefore improperly excluded from the jury. I deem it unnecessary, in this case, and therefore improper, to express an opinion whether a judgment in any case should be reversed unless error appears in the proceedings; or whether a judgment should be reversed because the record leaves it doubtful whether the court below did or did not err. With this explanation, I concur with Judge Moncure in reversing the judgment; agreeing fully with him in regard to the other questions.

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LEE, J. I agree that upon the issue joined in this cause enquiry into the pecuniary circumstances and condition of the defendant in error, at the date of the paper writing in question, was strictly relevant and german; and if the rejection of the settlements said to have been made by Crawford as executor of Sowers, as evidence in this case, was only to be justified by holding that such enquiry was impertinent or irrelevant, or if the action of the court, as disclosed by the first bill of exceptions, is properly to be regarded as an instruction to the jury to that effect, I should have little difficulty in holding that error had been committed for which the judgment should be reversed.

But there is a distinct ground upon which, as I understand the rule, to be deduced from the later cases on the subject, the rejection of these settlements must be sustained in this court. The witness, William B. Crawford, in testifying as to the sources from which, as he supposed, the defendant in error might have derived the means to make the supposed loan, professed to speak from memoranda taken upon a recent examination of books kept by him in the year 1845. This applies, as I understand the statement, as well to what he testified in reference to the estate of Sowers as to what he stated in regard to the other resources which Crawford had at command. Now, oral evidence of the

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contents of the books referred to was clearly inadmissible without the production of the books themselves; nor could the witness be permitted to speak as to the facts noted upon them unless he had a knowledge or recollection of them as distinct from the entries; though he might refer to the latter for the purpose of reviving his knowledge or refreshing his recollection. 1 Starkie Ev. 390; Ibid. 128; *Doe ex dem. Church v. Perkins*, 3 T. R. 749; *Henry v. Lee*, 2 Chitty's R. 124, 18 Eng. C. L. R. 273. Thus, all the evidence as to Sowers' estate, derived from the books referred to, might have been readily excluded, if the plaintiff in error had made this objection; and if the settlements of the accounts of that estate would have been otherwise irrelevant, they cannot be admitted in evidence, if objected to, because improper evidence had been given without objection on the part of the plaintiff in error or with his consent. For one party's consenting to the admission of incompetent testimony for his adversary is no reason for admitting other incompetent testimony in favor of the party so consenting, where objected to on the other side, even although the latter might serve to explain or contradict the former. *Wilkinson v. Jett*, 7 Leigh 115; *Unis v. Charlton*, 4 Gratt. 58; *Stringer v. Young's lessee*, 3 Peters' R. 320.

But supposing no question could have been made as to the competency of the evidence in relation to Sowers' estate, or that the witness gave other testimony, independently of the books, tending to show that the defendant in error might have had means at his command derived from Sowers' estate, this would not necessarily render the settlements of the accounts of that estate admissible in evidence. Their admissibility would depend upon their relevancy; and this of course refers to the nature and character of their contents. When examined, these might be found to be

relevant or wholly irrelevant. They might tend to meet the testimony of the witness Crawford, by showing that he could not have the control of funds to any large amount from that source, or they might fail to shed any light whatever upon the question of the means he had at command. But what state of facts they would disclose, we are not informed. They are not made a part of the bill of exceptions, so that the court can inspect them and judge whether they would be relevant or otherwise; nor does the bill of exceptions state their purport or what they would prove if received in evidence. Now it cannot be sufficient ground for reversing a judgment that evidence was excluded which might or might not have been relevant to the issue. On the contrary, it has been expressly decided by this court that when it is alleged error has been committed in excluding proper and relevant testimony from the jury, it is incumbent on the party seeking to reverse a judgment for this cause to show that error has been committed: And to this end the evidence offered and rejected must appear to have been relevant from the statement of the evidence alone; or, if the relevancy of the evidence depends on other facts, the party alleging the error must present such a case on the record as shows its relevancy. And if the testimony does not appear of itself, or upon the facts stated in the record, to have been relevant, it will be held in the appellate court to have been properly excluded. *Rowt's adm'r* v. *Kile's adm'r*, 1 Leigh 216; *Carpenter v. Utz*, 4 Gratt. 270; *Johnson's ex'r* v. *Jennings' adm'r*, 10 Gratt. 1.

I am aware there are certain cases from which it might seem to be deducible that the practice in such a case, where the bill of exceptions fails to show the relevancy of the evidence rejected, is to reverse the judgment and remand the cause for a new trial. *Fowler v. Lee*, 4 Munf. 373; *Hairston v. Cole*, 1 Rand.

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461. I conceive, however, the later cases above referred to establish a different rule, one more conformable to general principle, and in more strict analogy to the settled practice of the court in the case of a motion for a new trial where the bill of exceptions sets out the evidence instead of the facts proved in the cause. *Bennett v. Hardaway*, 6 Munf. 125; *Deems v. Quarrier*, 3 Rand. 475; *Carrington v. Bennett*, 1 Leigh 340; *Ewing v. Ewing*, 2 Leigh 337.

Without, therefore, entering into the reasons which may have weighed with the court in rejecting these settlements, I think it a sufficient answer to the objection to say, that enough is not shown by the bill of exceptions to enable this court to see that they furnished relevant testimony, and to say that the Circuit court erred in pronouncing them irrelevant.

Nor do I think the action of the court, as disclosed by the bill of exceptions, or the opinions which it expressed, should be regarded as an instruction to the jury that enquiry into the pecuniary circumstances of Crawford was not germane to the matter upon which they were called to pronounce. It is true, in delivering its opinions excluding the settlements of Sowers' estate, the court said that the evidence offered by the defendant was "too vague, remote and indefinite" in its character to sustain the plea of *non est factum* against such positive evidence of the genuineness of the signature to the bond. But this remark was not addressed to or intended for the jury. It was made upon a point which had been expressly withdrawn from their consideration and submitted to the judgment of the court. It was intended to explain to the counsel the reasons of the court for rejecting the testimony. It may not necessarily have been heard by the jury, or all of them. The presence of the jury is not necessary during the discussion and decision of a question of law arising incidentally before the court

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during a trial, and advantage is frequently taken, in practice, of the occurrence of such a question to permit jurors to withdraw; and sometimes the discussion and decision take place before the jury are called to take their seats after a recess of the court.

But even if this remark is to be regarded as having been heard by the jury, and if, standing alone and unexplained, it might have had an improper influence upon their minds, enough occurred immediately afterwards, and in the same connection, to prevent any such consequence. For the court formally and expressly declined to give an instruction in conformity with the opinion thus expressed: and this refusal to give such an instruction must be supposed to have engaged the attention of the jury equally with the opinion itself so incidentally expressed; and it served to admonish them that the opinion of the court upon the point of the exclusion of testimony was not to influence them in their deliberations upon the question of fact submitted to their decision. Surely it cannot be imputing too high a degree of intelligence to the jury to suppose that when the court formally declined to declare to them, as a matter for their guidance, what it had previously intimated, though incidentally, in giving an opinion excluding testimony, they would at once see that that opinion was not intended for them, and was to have no weight in their consideration of the case. Moreover, the court formally instructed the jury that they were bound to weigh and consider all testimony introduced by either party; and that it was competent for the defendant to show, by evidence as to the circumstances, relations and business of the parties, and by their whole conduct in connection with the bond in controversy, that it was either impossible or improbable that it was the act and deed of the defendant's testator. So far, therefore, from the instruction given by the court amounting to a ruling which excluded

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enquiry into the pecuniary circumstances of Crawford, it directly and in terms authorized the jury to make such enquiry.

It cannot be important to the ends of justice, nor will it tend to promote its due administration, but rather to obstruct it, to hold that an opinion expressed by a judge on the trial of a cause, perhaps not well considered, or touching a matter upon which it is the province of the jury to pass, but upon an incidental question arising in its progress, and not intended for or addressed to the jury, should be deemed to have the force and sanction of an express instruction, and to require a reversal of the judgment; especially, too, where enough occurred at the time and in the same connection to guard against the consequences of the inadvertence, and to leave the jury to form their own judgment. Such, I think, may fairly be considered the character of the present case, and in this respect it very much resembles the case of *Brooks v. Callo-way*, 12 Leigh 466. That was an action of slander. During the trial the court had ruled that the plaintiff might read the bill and answer in a cause in which his deposition (the truth of which had been impugned by the words imputed to the defendant) had been taken, for the purpose of showing the materiality of the deposition to the matters in issue. The defendant insisted that not the bill and answer only, but the whole record should be read. The court permitted the bill and answer to be read alone; and the judge said that if the whole record should be introduced, it would prove that the defendant was a slanderous man, from the efforts made in that cause, without success, to impeach the character of so many witnesses who had testified against him: but he at the same time told the jury that the statement so made by him, touching the contents of the record, had nothing to do with the case, and should not be regarded by them in their de-

cision. In delivering his opinion, in which the other judges concurred, Judge Allen said: "The expression used by the judge in excluding these depositions was not intended for the jury. So he informed them, and that it should not be regarded by them as anything in the decision of the cause. Nothing is more common than an instruction to the jury to disregard evidence improperly admitted. The jury are presumed to possess ordinary intelligence, and to be able to discriminate between what is proper for them to consider in forming their conclusions, and what, though occurring in their hearing, is no part of the case. Here the court did all it could to correct the inadvertence into which it had fallen." In this case the court did not in so many words tell the jury that the remarks which had fallen from it were not intended for their consideration, and should be disregarded by them, but, taking all that was said and done by the court at the time together, I think it was about equivalent.

But it is urged that the remark of the court accompanying the instructions to the jury was improper and objectionable, because it trenchd upon the proper province of the jury, and might have had an improper influence upon them.

To say of instructions asked for by counsel, that they were "clearly correct as abstract propositions," might, perhaps, convey by implication, to the mind of a lawyer, though probably not to that of a jury, the idea that there was no evidence which could give the principles of law, thus propounded, any application to the case. But if we are even to suppose that the jury would necessarily understand that such was the opinion of the court, still the court did not act upon that opinion, by refusing to give the instructions, but expressly gave them as propounding the law correctly; and adding, "that it might be safely left to the jury to determine how far they were applicable to the facts

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and evidence in the cause." Giving to the language of the court, then, its fullest import, it would seem to amount to no more than this: that although the court might, perhaps, in strictness, refuse to give the instructions, yet, as they propounded the law correctly, they could do no injury, and it might be safely left to the jury to say how far the facts and evidence in the cause called for their application. Thus interpreted, the remark of the court cannot afford any serious cause of complaint, though it was perhaps unnecessary, and might well have been omitted.

Another ground of error assigned is the refusal of the court to permit the recall of the witness, W. B. Crawford, and the renewal of his cross examination, and to require the production of the plaintiff's books, for the purpose of testing the accuracy of his statements. The witness had been cross examined on the day before, and the counsel had announced that they had concluded the examination of witnesses, but might on the following day offer some documentary testimony. Now, after a witness has been examined and dismissed, whether he may be recalled and re-examined is a matter within the sound discretion of the court; and this court cannot so well apprehend and appreciate all the circumstances which should weigh in the exercise of that discretion as the Circuit court might; and unless, therefore, it be plainly shown to have been unduly and improperly exercised, this court should not interfere. Nothing of the kind is shown here. No reason was assigned why the examination of the witness had not been completed before he had been dismissed; no mistake, or oversight, or after discovery suggested; but the recall appears to have been claimed as a matter of right, to enable the party to test the accuracy of his statements by reference to the plaintiff's books. No notice or rule had been given for the production of these, nor had they been produced,

though it is stated they were within one hundred yards of the court-house ; and it may be inferred their production was only then desired in case the party could be permitted to recall the witness. I think, therefore, whether the evidence that might have been educed by the recall of the witness and the production of the books would be relevant or otherwise, this court cannot undertake to say that the Circuit court improperly exercised its discretion in refusing to recall the witness, or erred in failing to require the production of the books in that connection.

The paper referred to in the third bill of exceptions was, I think, very properly rejected by the court. It was a tender of his consent by the defendant to the production and use of the plaintiff's books as evidence on the trial, upon certain conditions therein stated, accompanied by the reasons which he thought proper to assign for making the offer. If he desired to have those books on the trial, the law pointed out the mode in which their production could be enforced. This proposal to the plaintiff to produce and use them, on the condition named, was entirely gratuitous, and the plaintiff had a perfect right to accept or decline it, as he might think proper. Nor was any presumption to be raised against him, in any sense or for any purpose, if he chose the latter alternative. The offer having been made, but declined by the plaintiff, there, I think, was the end of the matter ; and the offer and non-acceptance, either with or without the reasons which the party chose to assign for making the offer, could not be made legitimate evidence in the cause for any purpose whatever.

I am of opinion to affirm the judgment.

MONCURE, *J.* This action was brought upon an instrument purporting to be the bond of John McDowell to Hugh J. Crawford, in the sum of "two thousand

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dollars, for borrowed money"; the whole of which, with the endorsements of credits thereon, except the signature of the obligor, was admitted on the trial to be in the handwriting of the obligee. The bond was unattested by any subscribing witness. The only issue in the case was on the plea of *non est factum*. The obligee, to sustain the issue on his part, introduced a number of witnesses, who testified that they were well acquainted with the handwriting of the said McDowell, and believed the signature to the bond to be his true and genuine signature. He also introduced two receipts, in his own handwriting, purporting to be receipts for interest on the bond; and introduced testimony to show that they were found in the house, and among the papers, of said McDowell, after his death. And here the obligee closed his evidence in chief. The executor of McDowell, to support the issue on his part, without offering any opposing testimony as to the genuineness of the signature to the bond, introduced evidence as to the circumstances, relations and business of the parties, and their conduct in connection with the bond in controversy, tending, in the opinion of his counsel, to show that it was not the act and deed of said McDowell, either because the signature thereto was not genuine, or, if genuine, the bond was obtained fraudulently or otherwise, in such an illegal manner as to render it not his act and deed. In the evidence so introduced by McDowell's executor there was evidence tending to show that the obligee had not the pecuniary ability to make a loan of the amount and character evidenced by the bond in controversy, and that he could not, at the date of the bond, have had such an amount of money for any purpose. To rebut the evidence of the defendant as to the pecuniary condition of the plaintiff at the date of the bond, the plaintiff introduced a witness, who testified, among other things, that the plaintiff had the

control of a large estate of John C. Sowers, of whom he was executor. To meet this evidence, the defendant offered to introduce the settlements made by the plaintiff of his accounts as executor of John C. Sowers, to show that at the date of the bond in controversy the plaintiff could not have had funds of that estate in his hands, sufficient of themselves, or with his own means, to have enabled him to make such a loan as that shown by the bond; and also to show that the plaintiff, as legatee and devisee of that estate, and deriving his whole property from that source, could not possibly have had the amount of available funds stated by his said witness. To the introduction of these settlements as evidence, the plaintiff's counsel objected, as irrelevant to the issue; and the court, sustaining the objection, refused to permit them to go to the jury. The defendant excepted; and this exception presents the first question which we have to decide in this case.

It is true that the plea of *non est factum* to an action of debt upon a bond puts in issue only the validity of the bond; and no evidence is relevant to the issue, or admissible, that does not tend to prove or disprove that the bond is the act and deed of the alleged obligor. If the defendant wishes to rely for his defence on any want or failure of consideration, or fraud, (unless it relates to the execution of the instrument; as if it be misread to the party, or he did not intend to sign such an instrument,) he must plead the matter specially, or apply for relief to an equitable forum. The evidence introduced by the defendant as to the circumstances, &c., of the parties, was introduced not to show any want or failure of consideration, or any fraud on the part of the plaintiff antecedent to or independent of the execution of the bond, but to show that the supposed bond was not the act and deed of the defendant's testator: And if it tended in any degree to show

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that fact, it was relevant and admissible evidence to be weighed by the jury. I think the evidence did tend to show that fact, and that it was therefore relevant and admissible. If authority were necessary to show the relevancy of such evidence, the cases of *Sides v. Schnebly*, 3 Harr. & McH. 243, and *Rowt's adm'r v. Kile's adm'r*, Gilm. 202, cited by the counsel for McDowell's executor, would, I think, be sufficient for the purpose. But the Circuit court in this case conceded the relevancy of the evidence in the instructions given to the jury, which will be hereafter noticed. This evidence of the defendant being admissible, and the plaintiff, to rebut it, having introduced testimony tending to show that he derived the means of making the loan for which the bond purports to have been given, or part of it, from the estate of Sowers, of whom he was executor, the question is, whether the settlements of his accounts as such executor, which the defendant offered to introduce to meet the said testimony of the plaintiff, were not admissible for that purpose? I am of opinion that they were, and therefore, that the court erred in excluding them. It may be said that the evidence, being documentary, should have been inserted in the bill of exceptions, according to the case of *Hairston v. Cole*, 1 Rand. 461. But the only reason for inserting the document in the bill of exceptions is to enable the appellate court to see whether it is relevant evidence. If its relevancy otherwise sufficiently appears upon the record, its insertion in the bill of exceptions is not necessary. *Archer v. Archer's adm'r*, 8 Gratt. 539. In this case I think the relevancy of the evidence which was excluded is sufficiently apparent on the record. The question upon which it was offered was, whether the plaintiff could have derived from the estate of Sowers, of whom he was executor, and also a devisee and legatee, the sum of two thousand dol-

lars, or any part of it, alleged to have been loaned by him to the defendant's testator on the 18th of March 1846? Upon this question, it seems to me, the settlements of the accounts of the plaintiff as executor of Sowers must necessarily shed some light. Indeed, the Circuit court seems not to have excluded these settlements because they did not shed light upon that question, but because it considered all the testimony of the defendant "too vague, remote and indefinite in its character to sustain the plea of *non est factum*, against such evidence of *factum* as the plaintiff had introduced"; and the court would have excluded all of the said testimony if it had been objected to; but as it was not, the court only excluded the settlements aforesaid, which were objected to. No matter how favorable they may have been to the defendant's side of the question, in regard to which they were offered, the court considered them inadmissible, and therefore excluded them: and this accounts for the failure of the court to insert them in the bill of exceptions. In *Hairston v. Cole*, *supra*, the document offered was a copy; and it did not appear from the bill of exceptions that the copy was duly authenticated. In this case the settlements themselves, and not a copy, appear to have been offered as evidence. The settlements had probably been made in the Circuit court; or, if in the County court, the originals may have been offered.

But even if the admissibility of these settlements as evidence be not sufficiently apparent on the record, and they should therefore have been inserted in the bill of exceptions, I think the Circuit court erred in not inserting them; and the judgment must, on that ground, be reversed, according to numerous and uniform decisions of this court, of which that in *Hairston v. Cole* is directly in point. The principle of these decisions is, that when an opinion of an inferior court,

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admitting or excluding evidence, or giving or refusing an instruction, is excepted to, the court must take care so to state the case in the bill of exceptions as that the appellate court may supervise the opinion, and determine whether it is right or wrong: otherwise, the judgment must be reversed, in order that the case may be correctly stated. Therefore, the judgment must always be reversed where the bill of exceptions to an opinion of the court, admitting or excluding evidence, is defective in not setting out the evidence admitted or excluded. The cases of *Fowler v. Lee*, 4 Munf. 373; *Hairston v. Cole*, 1 Rand. 461; *Raines v. Philips' ex'or*, 1 Leigh 483; *Bowyer v. Chesnut*, 4 Leigh 1, are cases in which exceptions were taken to the admission or exclusion of evidence. *Barrett & Co. v. Tazewell*, 1 Call 215; *Beattie v. Tabb's adm'rs*, 2 Munf. 254; *Brooke v. Young*, 3 Rand. 106, are cases in which exceptions were taken to instructions given or refused by the court. In all these cases the judgments were reversed on the ground that the statement of facts in the bill of exceptions was too imperfect to enable the appellate court to determine the question. The same course was pursued in *Thompson v. Cumming*, 2 Leigh 321, where the instruction excepted to was so ambiguously and imperfectly expressed that the appellate court could not collect the import and bearing of the opinion complained of.

I know of no case in this court which is inconsistent with this uniform course of decision. There may be one or two apparently so, but when strictly scanned they will be found to be otherwise. The case of *Rowt's adm'x v. Kile's adm'r*, 1 Leigh 216, is one of this class. That was a suit upon a bond, and the issue was on the plea of *non est factum*. An exception was taken to the exclusion of evidence of a remark of Richard Rowt (no party) that *his pen had not forgot to write*. There was no ground laid connecting this with the issue, no

conversation stated which led to or followed the remark; nothing to show how it could possibly bear on the case: And Judge Carr said, "I cannot think that so light and trivial and unconnected a remark should induce us to send back a case, where there have been two trials, in both of which the jury have found the same way." He had previously, it is true, made the general remark, that "when we are called on to reverse the decision of a judge, it is incumbent on the party seeking this to show that there is error; and to this end he ought to present to us such a case as shows the relevancy of the evidence rejected." But that remark must be referred to the case under consideration; in which it did not appear that the facts were imperfectly stated in the bill of exceptions. *Non constat* that there was any evidence which connected the "light and trivial" words of Richard Rowt with the case. The conjecture that there might have been such evidence was not a sufficient reason for reversing the judgment, and sending the case back for a third trial. If there was such evidence, the party seeking the reversal of the judgment ought to have presented such a case as to have shown it. In that case, as before remarked, the bill of exceptions is perfect on its face. In this case the defect, if any is apparent on the face of the bill of exceptions, consists in not setting out the settlements therein stated to have been offered as evidence. Judge Carr certainly did not intend, by anything which he said in that case, to controvert the principle of the decisions to which I have referred; for he had expressly admitted that principle, and followed the authority of the earlier decisions in the case of *Brooke v. Young*, 3 Rand. 106. The case of *Carpenter & wife v. Utz*, 4 Gratt. 270, is another of the class before referred to. There the judgment was affirmed, because the evidence stated in the bill of exceptions as having been excluded by the court below

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was, standing by itself, clearly irrelevant and inadmissible; and there was nothing to show that it had any connection with the case. It presented precisely the same question which was presented by the case of *Rowl's adm'r v. Kile's adm'r*; and Judge Allen, in delivering the opinion of the court, uses substantially the same general remark which was used by Judge Carr, as before stated, "that where it is alleged that error has been committed in excluding proper and relevant testimony from the jury, it is incumbent on the party seeking to reverse a judgment for this cause to show that error has been committed." But, as in that case, this remark must be referred to the case under consideration; and then it will be consistent with all the other decisions on the subject. That it was intended to be so referred plainly appears by what immediately follows in the same sentence, viz: "and to this end the evidence offered and rejected must appear to have been relevant from the statement of the evidence alone; or, if the relevancy or irrelevancy of the evidence offered depends upon other facts in the cause, the party alleging the error should present such a case on the record as shows the relevancy of the evidence rejected." The court ought not to reverse a judgment upon a mere conjecture that there may have been other evidence showing the relevancy of that stated in the bill of exceptions. The difference between the two cases is like the difference between a defective case and a case defectively stated. In the one case the appellate court, so far as appears from the record, has the same question before it which was passed upon by the court below, and may therefore revise the decision of that court. In the other, the appellate court has not the question passed upon by the court below fairly before it, and must therefore remand the case, that a more perfect statement may be made. The cases in which exceptions have been

taken to opinions of the court overruling motions to set aside verdicts, on the ground that they were contrary to evidence, form a peculiar class, resting on peculiar reasons, and are not in conflict with the principle before stated. Such opinions may, in Virginia, be revised by an appellate court; but, generally, only where the facts, and not the evidence, are certified by the court below: And if the evidence, instead of the facts, be certified, the appellate court will, generally, on that ground decline the supervision of the opinion, and affirm the judgment. It will not remand the case for a more perfect certificate, because *non constat* that such a certificate could be made. There may have been a conflict of evidence, or it may have been complicated, or come from witnesses of doubtful credibility; and the court below may have been unable or unwilling to weigh the evidence, and determine and certify the facts.

In delivering the opinion excluding the evidence before mentioned, the Circuit court stated, "that upon the issue in this cause, the plaintiff having introduced ten witnesses, all of whom swore positively to the genuineness of the signature to the bond, it was sufficient evidence, the bond being found in possession of the plaintiff, from which the jury should presume sealing and delivery, and due execution thereof, unless met and overthrown by opposing testimony on the part of the defendant; and that as the defendant had failed to introduce any opposing proof as to the genuineness of the signature, all the other testimony introduced by him without objection, as well as that now objected to, was too vague, remote and indefinite in its character to sustain the plea of *non est factum* against such evidence of *factum* as the plaintiff had introduced, and would have been excluded if objected to; but as it was not, all the court could do was to exclude that

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now objected to." The defendant excepted to this opinion of the court pronounced concerning the evidence already introduced by him; and the question now arises, whether the court erred in giving the opinion; and if so, whether, on that ground, the judgment ought to be reversed?

It is a fundamental maxim, that the court responds to questions of law, and the jury to questions of fact. The court must decide as to the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact. The cases in this court in affirmance of this position are too numerous to be cited. Most of them are collected in 1 Rob. Pr. 338-344. As the author says, they "evinced a jealous care to watch over and protect the legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that where the evidence is *parol*, any opinion as to the *weight, effect, or sufficiency* of the evidence submitted to the jury; any assumption of a fact as *proved*; or even an intimation that written evidence states matter which it does not state, will be an invasion of the province of the jury." *Berry v. Essall, &c.*, 2 Gratt. 333, is a case on the same subject, which occurred after the publication of that work. There may be others, but it is unnecessary to cite them, as they all, I believe, tend to sustain the same doctrine.

There can be no doubt, I think, but that the opinion in question is in conflict with this doctrine. The court declared that the evidence of the defendant as to the circumstances, relations and business of the parties, and their conduct in connection with the bond in controversy, which was admissible evidence, and was so considered and had been admitted by the court, was

too *vague, remote and indefinite* in its character to sustain the plea of *non est factum* against such evidence of *factum* as the plaintiff had introduced.

The court here weighed the plaintiff's evidence of *factum* against the defendant's evidence of *non est factum*, and decided the question of preponderance in favor of the former. If the court had given this opinion to the jury in the shape of an instruction, it would clearly have been such an invasion of their province as to have required the reversal of the judgment. But had not the expression of the opinion in the course of the trial, and in the presence of the jury, the same effect? Had it not at least a strong tendency to influence the minds of the jury? I think that it certainly had. It is the duty of the jury to be governed by the opinion of the court on questions of law arising in the course of the trial; and they will naturally and properly attend to and respect every such opinion, however it may be expressed to them; whether in the form of an instruction or not. The more intelligent and upright the jury, the more apt they will be to pursue this course. They are unlearned in the law, and cannot be expected to know the precise line which divides their province from that of the court. It will not do, therefore, to say that when the court, by the expression of any opinion, crosses the line and invades their province, they may and ought to disregard the opinion, and weigh the evidence for themselves. The same may be said in every case in which the court gives an opinion to the jury on the weight of evidence. In the case of *Gregory v. Baugh*, 2 Leigh 665, the Circuit court, in a charge or instruction to the jury, stated matters as being in a written deposition, and instructed the jury that that matter was legal evidence; but in point of fact no such matter was in the deposition: It was held that this was calculated to mislead the jury, and was error for which the verdict should be set aside,

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and the judgment reversed. The court, consisting of four judges, was unanimous in this decision. It was argued with great force that it was impossible the charge could have deceived or misled the jury: The depositions were before the jury; the cause turned chiefly on them; they were doubtless the subject of minute examination and discussion at the bar; and it was to be presumed they were carried by the jury from the bar into the jury room, read there, and considered. "It was said," answered Judge Carr to this argument, that "the jury would read" the affidavit "for themselves, and not take the court's version of it. This they *might do*, as, in any other case where the court undertook to instruct them on the *weight* or *effect* of evidence, they might disregard such an instruction; yet it would be error in the court to give it." Judge Green said, "The instructions were calculated to mislead the jury, more or less, by inducing them to believe that the court was of opinion that such was the effect of the depositions." Judge Cabell concurred with Judge Green. And Judge Brooke said, the objection to the instruction is not "obviated (as was argued by counsel) by the circumstance that the evidence was in writing, and would be seen by the jury, who might correct the mistake of the judge." In that case the mistake of the court was as to a mere matter of fact, and could have been corrected by merely reading the depositions, which it was the duty of the jury to do, and which, therefore, they probably did; and yet, because they may have been misled by the statement of the court, the judgment was reversed. In this case the court weighed the evidence, and pronounced an opinion upon it, and the error, if any, could not be so easily corrected. It is the ordinary case of an opinion of the court as to the weight, effect, or sufficiency of evidence submitted to the jury; which is a good ground for reversal of a judgment according

to all the authorities. Such an opinion is certainly calculated to mislead them, whether it be communicated to them in the form of an instruction, or be merely expressed by the court in their presence, in the progress of the trial. In either case, they are authentically informed of the opinion, and it must have an influence upon their judgments; probably as much in the one case as the other; but whether the same, or more or less, the principle involved is not affected.

It may be said that it does not certainly appear from the record that the opinion of the court was expressed in the presence of the jury. I think the fact sufficiently appears from the record. The presumption is that the jury is present during the whole progress of the trial. It may sometimes happen that the jury may be temporarily absent during the discussion of a question of law arising in a case: But this rarely occurs; and when it does occur, the party interested in the fact should take care to have it stated on the record. In the absence of such a statement, the appellate court will presume that that occurred which generally, rather than that which very rarely, occurs. The statement in the bill of exceptions tends strongly, if not conclusively, to show that the jury were present when the opinion was expressed. The opinion was excepted to; which would not have been done if the jury had not been present and heard the opinion; or, if it had been done, the court would have certified that the jury were not present when the opinion was expressed; for that fact would have shown that the defendant was not prejudiced by the opinion. It was not intimated in the argument of the case in this court that the jury did not hear, or might not have heard, the opinion: It may, therefore, be safely assumed that they did hear it.

I do not think the error of the court in giving the opinion was cured by not excluding the evidence from

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the jury. The court would have excluded it, if a motion had been made for that purpose; and so declared.

The error consists in giving an opinion of the weight, effect, or sufficiency of evidence *submitted to the jury*.

Nor do I think the error was cured by the instructions which, on the motion of the defendant, were given by the court to the jury before they retired to consider of their verdict. Those instructions were:

1. That the jury are bound to weigh and consider all testimony introduced by either party without objection, unless, upon a motion made to the court, such evidence is excluded.

2. That upon the issue in this cause, it is competent for the defendant to show, by evidence as to the circumstances, relations and business of the parties, and by their whole conduct in connection with the bond in controversy, that it is either impossible or improbable that the bond sued upon is the act and deed of defendant's testator.

If the force of these instructions had been undiminished by any accompanying remark of the court, they would merely have declared to the jury their obligation to weigh the evidence before them, and the competency of the defendant, by such evidence, to maintain his plea of *non est factum*; and would not have obviated the effect of the opinion previously expressed as to the insufficiency of the evidence. Whenever a court gives an opinion upon the weight, effect, or sufficiency of evidence submitted to the jury, it would no doubt also, if required, instruct them that it is their duty to weigh the evidence: but surely such an instruction would not remove the influence of the opinion, which would still remain unretracted, notwithstanding the instruction.

But the court accompanied these instructions with the remark, that they were clearly correct, *as abstract propositions of law*, and that it might be safely left to

the jury to determine how far they were applicable to the facts and evidence in the cause. The meaning of the court in this remark is perfectly intelligible, when taken in connection with the opinion previously expressed, and must have been understood by the jury. Instead of being a retraction, which might have cured the error, it was a reaffirmance of that opinion. It was a strong intimation, if not an express declaration, that the propositions of law embodied in the instructions were mere abstractions, having, in the opinion of the court, no sufficient foundation in the evidence to give them practical effect. The remark that it might be safely left to the jury to determine how far they were applicable to the facts and evidence in the cause does not mend the matter; for the jury had just, in effect, been informed that the instructions had no application to the facts and evidence in the cause, which, in the opinion of the court, were wholly insufficient to sustain the issue on the part of the defendant.

The case of *Brooks v. Calloway*, 12 Leigh 466, does not affect this case. There the judge made a statement in regard to the contents of a record which was not in evidence; but he at the same time told the jury that the statement had nothing to do with the case, and should not be regarded by them as anything in their decision of it. The inadvertence was corrected as soon as it was committed. The difference between the two cases is too palpable to require further remark.

In regard to the question presented by the second bill of exceptions, that is, whether the court erred in refusing to permit the plaintiff's witness, William B. Crawford, to be recalled, or to require the production of the plaintiff's books, which were then within one hundred yards of the court-house: Two reasons are assigned by the court for the refusal: 1. That the evidence would not be relevant to the issue; and 2, that the defendant's counsel had, on the evening

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before, announced that they had concluded the examination of witnesses, as stated in the first bill of exceptions.

In regard to the first reason : The plaintiff, to prove his ability to make the loan to the defendant's testator, introduced the witness above named, who testified that he was the book keeper of the plaintiff in his mercantile establishment up to November 1845 ; and that at that time the plaintiff was in possession of a large amount in cash-notes and accounts, of his own property, which had not been known to any of the witnesses who had testified as to his circumstances. The witness professed to speak from memoranda taken upon a recent examination of the books kept by him in 1845. I think this statement of the case, with what has been already said in answer to the questions presented by the first bill of exceptions, is sufficient to show that the books were relevant and admissible evidence for the purpose for which they were proposed to be introduced. They were referred to by the plaintiff's witness, who spoke from *memoranda* taken from them ; and they were the best evidence of what they contained, and were easily accessible.

In regard to the other reason assigned by the court : Although the practice of our courts has been liberal in allowing parties, after their evidence is closed, to recall witnesses for the purpose of supplying facts omitted from inadvertence ; and although I think such permission should be given wherever there is no ground to suspect improper practice, the object being to elicit truth and secure the attainment of justice ; yet I am aware that the judge, before whom a case is tried, must necessarily have large room for discretion on this subject, and I think an appellate court should seldom interfere with its exercise. In this case the judge would doubtless have permitted the witness to be recalled, and have required the production of the books,

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if he had considered them relevant evidence. Moreover, it may be said that though the defendant's counsel had, on the evening before, announced that they had concluded the examination of witnesses, yet they also announced that they would probably, on the next day, offer documentary evidence; which they accordingly did, but it was excluded by the court. The exclusion of this evidence may have been a reason for the motion, made immediately thereafter by the defendant's counsel, to have the witness recalled and the books produced; and ought, I think, to have had some effect in inducing the court to sustain the motion. I am of opinion that the court erred in overruling it.

In the cases of *Stringer v. Lessee of Young*, 3 Peters' R. 320; *Wilkinson v. Jett*, 7 Leigh 115; and *Charlton v. Unis*, 4 Gratt. 58, it was decided that the introduction of irrelevant or incompetent evidence by one party, without being objected to by the other party, or with his assent, does not authorize the latter to introduce such evidence. This doctrine is reasonable; but does not, I think, affect the question I have just been considering. It does not appear that the memoranda taken by the witness from the plaintiff's books were exhibited as evidence before the jury, or even that he had them before him when he gave his testimony. He professed to speak from them; and seems to have used them merely for the purpose of refreshing his recollection of facts within his personal knowledge. If they had been exhibited before the jury, they would not have been irrelevant, but merely secondary, evidence; to which the other party might have objected because secondary, and required the production of the books themselves as primary evidence: But he was not bound to make such objection; and not having made it, the evidence, which was before relevant, would then have become competent, and he might counteract its effects by the production of the books or any other

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legal evidence. If the memoranda were merely referred to by the witness to refresh his memory, that fact could certainly be no good reason for refusing to require the production of the books, which were not only relevant, but primary evidence.

In regard to the question presented by the third and last bill of exceptions: I think the court properly excluded the evidence therein mentioned. If the defendant wished to use the plaintiff's books as evidence, the law provided ample means to enforce their production; and not having chosen to pursue those means, he had no right to resort to other means, and prove the plaintiff's refusal to comply with them, in order that inferences to the prejudice of the plaintiff might be drawn by the jury from the fact of such refusal.

Upon the whole, I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial to be had therein.

DANIEL, *J.* concurred in the opinion of *Moncure, J.*

ALLEN, *P.* concurred in the opinion of *Lee, J.*

JUDGMENT REVERSED.

Lewisburg.

BROOKS v. WILCOX.

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August 14th.

1. A landlord having distrained for rent in arrear, reserved in salt, has the affidavit and warrant of distress returned to the Circuit court; and the defendant appears there, and a jury is impaneled to ascertain the value of the rent in arrear, which, not being able to agree, is discharged; and the landlord dismisses the case in that court. He may then apply to the County court to have the value of the rent ascertained, basing his application on the same affidavit and warrant of distress.*
2. If the officer levying the distress thinks that he has not taken sufficient effects, he may make a second levy.
3. The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascertain the rent *said to be due*.
4. Whether a plaintiff shall be permitted to introduce further evidence after the defendant's evidence is introduced, is a matter within the discretion of the court trying the cause; and its exercise will rarely, if ever, be controlled by an appellate court: Clearly he is entitled to introduce evidence to rebut that of the defendant.
5. The only object of the proceeding before a jury in the case of a distress for rent is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a distress warrant has been levied for rent in something other than money, and that it is due and in arrear.
6. The jury having ascertained the value of the rent in arrear, the court makes an order directing the officer to sell the property distrained as is directed by law, and after satisfying the rent due, with interest and costs, to pay over the balance to the tenant. This is substantially in accordance with the statute.
7. Under the act of March 2d, 1827, the landlord was entitled to interest on rent in arrear, from the time it was due.*

*See the opinion of Judge *Moncure* for the statutes, 1 Rev. Code of 1819, ch. 113, § 12, p. 449; Sess. Acts 1827, ch. 27, § 3, p. 26.

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At the January term 1850 of the County court of Kanawha, Luke Wilcox filed a notice, with an affidavit of its service, to James G. O. Brooks, that he would apply to said County court to ascertain the value in money of five thousand bushels of salt of first quality, &c., it being for rent in arrear, and reserved upon contract with him, and for which said Brooks' property had been distrained; and for such other and further order as the court might lawfully make in the premises. Upon this notice he founded a motion to ascertain the value of five thousand bushels of salt reserved for rent. This motion was continued until the December term of the court, when the defendant appeared and moved to quash the motion, on the ground that the plaintiff had previously made a similar motion in the Circuit court, which had been entertained in that court, and there had been a trial by a jury, which could not agree, and were discharged; and then the court, on his motion, had permitted him to withdraw his notice and motion, and dismiss the same from the docket at the December term 1849. And he produced a record of the proceedings in the Circuit court, which showed that these proceedings were based upon the same affidavit of the plaintiff as to the rent due, and the same warrant of distress, on which this motion in the County court was based. And he showed that the officer had first levied the warrant on four hundred and five barrels of salt, pending the proceeding in the Circuit court; and after that proceeding was dismissed, he levied on an additional two hundred and thirty-five barrels. The County court refused to quash the motion; and the defendant excepted.

The defendant then elected that the value of the salt, said to be due from him to the plaintiff, should be ascertained by a jury; which was accordingly impaneled, and sworn to ascertain the value of the rent in

money of the salt said to be due from the defendant to the plaintiff.

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On the trial the plaintiff introduced witnesses to prove the value of salt in 1849, and then rested. Thereupon the defendant by his counsel then informed the plaintiff that if he had other evidence of the value of salt in that year, he should then introduce it, or it would be objected to if offered after the defendant had introduced his evidence on that subject. The plaintiff, however, declined to examine other witnesses; and the defendant introduced his evidence as to the value of salt in 1849, and closed. The plaintiff then introduced a witness, whom he had sworn before and omitted to examine, and asked him as to the value of salt in 1849; to which evidence the defendant objected, on the ground that it was evidence in chief which the plaintiff had voluntarily omitted to introduce in the opening of the case after notification by the defendant. But the court overruled the objection; and the defendant again excepted.

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After all the evidence had been introduced, the defendant moved the court to give six several instructions to the jury. These instructions were, in substance, that to entitle the plaintiff to a verdict he must prove a lease by himself to the defendant, reserving a rent in some other property than money; and that the rent was in arrear, and a distress had been levied. The court refused to give the instructions; and the defendant again excepted. The jury then found a verdict by which they ascertained the value of twenty-five hundred bushels of the salt to be five hundred dollars, and the value of the other twenty-five hundred bushels to be five hundred and seventy-five dollars: And they ascertained the value of fifty barrels of salt, which had been received in part of the rent due, to be eighty-three dollars and sixty-three cents. Whereupon the court made an order directing the officer who

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had made the levy to make sale of the salt mentioned in his return, as is directed by law; and out of the proceeds of such sale, if sufficient for the purpose, to pay to the plaintiff the amount ascertained by the verdict, with interest from the time it was due until paid, subject to the credit ascertained by the verdict; and also to pay the plaintiff his costs. And he was further directed to pay any balance of the proceeds of sale to the defendant.

The defendant obtained a *supersedeas* to this judgment from the Circuit court, where it was affirmed. Whereupon he applied to this court for a *supersedeas*, which was allowed.

McComas, for the appellant.

Fry, for the appellee.

MONCURE, J. This is a *supersedeas* to a judgment of the Circuit court, affirming an order of the County court of Kanawha, directing a sale of certain property distrained for rent reserved in salt. The order was made in pursuance of 1 Rev. Code of 1819, ch. 113, § 12, p. 449, which declares, that "Whenever any distress shall be made for rent reserved in wheat, corn, or anything other than money, it shall be lawful for the landlord or lessor to apply to the court of the county or corporation, or to the Superior court of law for the county in which the leased tenement may lie, to ascertain the value in money of the rent in arrear so reserved, and to order the property so distrained, or so much thereof as may be necessary, to be sold for the satisfaction of such rent. And the court to which such application shall be made, ten days' previous notice thereof having been given to the tenant, or, in case of his absence from the county, being set up at some conspicuous place on the tenement, shall proceed to ascertain the value in money of the rent in arrear

so reserved, either by their own judgment, or, if required by either party, by the verdict of a jury summoned and impaneled at their bar for that purpose, without the formality of pleading; and, having so ascertained the value, shall order a sale of the property so distrained, and award costs to the landlord or lessor."

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Various errors in the proceedings in the case were assigned by the plaintiff in error, some of them in the petition for a *supersedeas*, and others, for the first time, in the argument of his counsel in this court. I will notice them in the order of time in which the proceedings complained of occurred.

First. I think the court did not err in overruling the motion of the tenant, the plaintiff in error, to dismiss or quash the notice and motion of the landlord, the defendant in error. The grounds on which it was contended that the landlord's notice and motion should be quashed were, that they were founded on the same affidavit and distress warrant on which similar proceedings had been instituted in the Circuit court, but the jury having disagreed and been discharged, the landlord, with the leave of the court, withdrew his notice and motion in that behalf, and the case was dismissed from the docket of the court; and also, that after such dismissal, and before the institution of the proceedings in the County court, the warrant was levied on two hundred and thirty-five barrels of salt, in addition to the quantity on which it had been previously levied. The statute gave the landlord a right to make the application to the Circuit or County court at his election. He made it to the Circuit court; but having withdrawn it, by the leave of that court, before it was finally acted on, he had a right to make it to the County court. There was no necessity for a new affidavit and warrant to authorize the proceedings in the County court. The affidavit

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and warrant were not affected by the abortive proceedings in the Circuit court; and the landlord had the same right to proceed thereon in the County court, as if the proceedings in the Circuit court had not taken place. The warrant had not become *functus officio* when the additional levy on two hundred and thirty-five barrels of salt was made; and that levy was therefore legal. A writ of *fiery facias*, after being levied on property insufficient, in the opinion of the officer making the levy, to satisfy the writ, may be levied on other property at any time on or before the return day of the writ. The same principle applies to a distress warrant, except that it has no return day, and may be levied at any time; at least, if it be a reasonable time after it is placed in the officer's hands. The officer may be mistaken in the value of the property first levied on, or he may not be able to find sufficient property at first to satisfy the execution or distress warrant. And "it is for the advantage of the owner of the goods," as was said by Lord Mansfield in *Hutchins v. Chambers*, 1 Burr. R. 579, 589, "that this should be so: It is better for him that the officer should be at liberty to seize a second time, in case he makes an insufficient seizure the first time; or else it might induce him to a necessity of taking effects of very great value at first; for, if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at first."

Secondly. I think the objection made to the form of the oath administered to the jury, "to ascertain the value of the rent in money of the salt *said to be due* from the" tenant to the landlord, is invalid. The statute does not prescribe the form of the oath; and its requisitions were substantially complied with in this case. The words "said to be due" obviously refer to the notice in which the kind and amount of the rent in arrear, the times when payable, and the

fact that it was reserved upon contract, and had been distrained for, are minutely set forth.

Thirdly. I think the court did not err in permitting the landlord's witness to answer the question, and give testimony as to the value of salt in the year 1849, after the tenant had examined his witnesses, as stated in the second bill of exceptions. The subject of the examination of witnesses lies chiefly in the discretion of the court in which the cause is tried, and its exercise will rarely, if ever, be controlled by an appellate court. It does not appear to have been improperly exercised in this case, but the contrary. The testimony objected to seems to have been offered to rebut the evidence of the tenant's witnesses, and for that purpose was certainly proper.

Fourthly. I think the court did not err in refusing to give the instructions asked for by the tenant. They are based on the supposition that in such a proceeding it is necessary for the landlord to prove to the jury that a distress warrant has been levied for rent reserved in something other than money, and due and in arrear. I think that no such necessity exists. No judgment is rendered against the tenant. The only object of the proceeding is to ascertain the value in money of the rent in arrear. When that is done the landlord is placed in the same situation in which he would have stood if the rent had been reserved in money. The officer proceeds in the same way to complete the execution of his duty under the warrant: and the remedies of the tenant for a wrongful distress are the same in the one case as the other. The order of court ascertaining the value of the rent, and directing a sale of the property distrained, did not prevent the tenant from resorting to his remedy by writ of replevin, before that remedy was abolished by the Code; but he might have done so at any time before the property was actually sold. See *Jacob v. King*, 5 Taunt. R.

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451, 1 Eng. C. L. R. 154; Archbold on Landlord and Tenant 125, 53 Law Libr. 131.

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In the case of *Redford v. Winston*, 3 Rand. 148, which was an attachment for rent before the passage of the act of March 2d, 1827, Sess. Acts ch. 27, p. 25, it was decided that the tenant could not put in any plea or make any defence which might call in question the truth of the landlord's oath before the magistrate, or contest his claim to rent upon the merits, although two of the judges were of opinion that a writ of replevin could not be maintained in such a case; the other two giving no opinion upon the question. There is less reason for permitting the tenant to make any such defence in this proceeding, as none of his remedies for a wrongful distress are impaired or affected by it. Of course the court would not entertain an application for an enquiry as to the value of the rent, without being satisfied that rent reserved in something other than money had been distrained for: The warrant and return would be sufficient evidence of that fact. If the notice stated the fact with sufficient certainty, and the tenant did not controvert it, the court, without requiring further evidence, might properly proceed to ascertain the value of the rent, either by their own judgment, or, if required by either party, by the verdict of a jury. The only function of the jury, if required, is to ascertain the value of the rent mentioned in the warrant or the notice. In this case the affidavit, warrant, return and notice were all before the County court; and the tenant elected to have the value of the rent ascertained by a jury: which was accordingly done.

Fifthly. I think that the objection to the terms in which the order of sale was made is invalid. That objection is, that the statute directs only so much of the property distrained as may be necessary for the satisfaction of the rent and costs to be sold, and the

residue to be returned to the owner; whereas the order directs all the property distrained to be sold, and the overplus, after satisfying the rent, interest and costs, to be paid to the tenant. I think the order conforms to the statute, which directs the court to order a sale of "the property distrained"; not so much of it only as may be sufficient for the satisfaction of the rent and costs. It is true that the statute makes it the duty of the officer, in executing the order of sale, to sell only so much as may be sufficient for that purpose. But there is nothing in the order which is in conflict with that duty of the officer; for it expressly requires him to make sale of the property distrained, "as is directed by law." The direction to pay the overplus, if any there be, remaining from said sale, after satisfying to the landlord his rent, interest and costs, may be referred to an overplus which might exist, if the officer should conform as nearly as he could to the directions of the law; for the officer cannot know how much of the property distrained will sell for precisely the amount of the rent, interest and costs.

Sixthly and lastly. I think the landlord was entitled to interest upon the rent from the time it became due, as mentioned in the order, by virtue of the act of March 2d, 1827, before referred to; the 3d section of which provided, that interest should thereafter be allowed on rent in arrear from the period or periods at which the whole or any portion thereof should become due.

I see no error in the judgment of the Circuit court, and am therefore for affirming it.

The other judges concurred in the opinion of *Moncure, J.*

JUDGMENT AFFIRMED.

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KOINER *v.* RANKIN's *heirs.*

August 14th.

1. In a writ of right the tenant, to defend his possession under the statute of limitations, may show a possession anterior to his patent; and to show color of title may introduce the entry and survey upon which his patent issued. But as there can be no adversary possession against the commonwealth, he cannot show possession further back than the senior grant.
2. The effect of a patent issued upon an inclusive survey, and the right of the tenant claiming under it to show possession under color of title, is the same as in other grants. He may give in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey made in pursuance of the order: But he cannot show possession further back than the senior grant.
3. To protect himself under the statute of limitations, the tenant must show continued adversary possession, for the time of limitation, of some part of the land in controversy. Actual possession of a part of his land, outside of the boundaries of the demandant's elder patent, is not sufficient.
4. While patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition.
5. The quantity and boundaries of the land described in the count and in the verdict vary from each other; but the verdict finds that the land therein described is the tenement mentioned in the count. It is to be presumed that the description given in the count is a mistaken description, and that the land recovered is the land demanded.

This was a writ of right brought in July 1829, in the County court of Augusta, by Joseph Rankin against Robert Koiner, which, upon the death of Rankin, was revived in the name of his heirs. The count claimed twenty acres of land adjoining the lands of Joseph Rankin and Robert Koiner, beginning at two white oaks corner to James Rankin's land on the wetstone

line, and then describing eight lines by course and distance, which, upon being laid down on a plat, did not close.

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The cause was removed to the Circuit court of Augusta, and came on for trial in November 1849. The tenant claimed under a patent founded on an inclusive survey, which embraced the land in controversy. He proved an entry by John McDougall for twenty acres of land on the 23d of May 1793, a survey thereon on the 18th of June in the same year, and a patent for it to McDougall dated the 12th of August 1795. He also proved the application by McDougall to the County court for an inclusive survey, which was authorized by the court; and also the survey, which embraced the tract aforesaid and three others, for which patents had been granted by the commonwealth in 1742, 1772 and 1778: This survey contained six hundred and eighteen acres; and a patent was issued thereon bearing date the 17th of May 1797. He further proved a regular conveyance of this tract of land through several successive conveyances to himself; and that the land in controversy was the land embraced in the patent for twenty acres, dated the 12th of August 1795; and that the true quantity was twenty-three acres, one rood and twenty-six poles. The tenant also proved by a witness that he was personally acquainted with the tract of six hundred and eighteen acres, from a period between 1801 and 1804; and he was acquainted with it from information from the year 1797, when McDougall conveyed it to the witness's father. That witness's father was in possession of the land when witness became acquainted with it; and it had been held by the successive purchasers under McDougall from that time to the time of the trial. That a part of the land in controversy had been cleared in 1812 or 1813 by the purchaser from his father; and that the taxes had been regularly paid upon it since 1797.

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And that Joseph Rankin had never had possession of any part of the land in controversy.

The demandants, to sustain the issue on their part, introduced in evidence a patent from the commonwealth, bearing date the 21st of July 1794, by which there was granted to Joseph Rankin two hundred and ninety acres of land; which it was proved included the land in controversy: And they introduced the will of Joseph Rankin, by which he devised his property to them.

After all the evidence had been introduced, the court, upon the motion of the demandants, instructed the jury as follows:

1. If the jury believe from the evidence, that the demandants have the elder patent to the land in controversy, then the effect of the emanation of the junior inclusive patent, under which the tenant claims, is no more than the effect of any other patent would be, and only operates as any other patent would do, to give the tenant color of title; which color of title can only serve him in this cause provided he shall have shown, in addition thereto, a continued, actual adversary possession in himself, and those under whom he claims, of the land in controversy, for a period of at least thirty years immediately preceding the emanation of the demandants' writ in this cause.

2. That possession, to avail the tenant, must have been an actual adversary possession of a part or the whole of the land in controversy; and cannot be acquired by open and notorious acts of ownership short of actual occupation, use or enjoyment.

3. That while patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition.

No exception was taken to these instructions by the tenant.

The jury found a verdict for the demandants for twenty-three acres, one rood and twenty-six poles, designating the boundaries thereof by lines, all of which varied from those described in the count: And the court rendered a judgment for the demandants according to the verdict.

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After the jury had rendered their verdict, the tenant moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, stating that the only question in the cause was the statute of limitations, the demandants having clearly proved the elder title; and that upon the statute of limitations, if the jury had found for the tenant, they would have done no more than he would have done had he been sitting as a juror; but the court could not consider the verdict as involving such a manifest departure from the evidence as to justify its interference by setting aside their verdict.

At a subsequent day of the term the tenant again moved the court for a new trial, upon the grounds, first, that the jury misunderstood the instruction of the court; and he produced an affidavit of three of the jurors, in which they state that after the argument was closed they had made up their minds to find for the tenant on the statute of limitations, and would have so found but for an instruction of the court, which they understood to be substantially, "That the tenant must have proved an adversary possession of the land in dispute for thirty years prior to the suit, separate and independent from possession for that length of time of the inclusive survey which embraced within its limits the disputed land." That they were satisfied the tenant and those under whom he claimed had actual possession, for more than thirty years prior to the institution of the suit, of part of said inclusive survey; and if that was sufficient, they were satisfied

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the jury found an improper verdict; but if the law required the tenant to prove actual occupation and improvement of the land in dispute, without reference to it as a part of the inclusive survey, then they thought the verdict correct. The second ground for the new trial was, that if the instruction was not misunderstood, the court had misdirected the jury as to the law: For that possession under the inclusive survey and patent of any part of the land included therein was, in legal contemplation, possession of the twenty-three acre tract, which was the tract in controversy, although no actual occupation or possession of that tract or any part of it was proved. But the court overruled the motion; and the tenant excepted, embracing the action of the court upon both motions in his exception: And he applied to this court for a *supersedeas*, which was allowed.

Fultz, for the appellant.

H. W. Sheffey and *Michie*, for the appellees.

LEE, *J.* I think the first instruction given to the jury, on the motion of the demandants' counsel, will not bear the construction placed upon it by the counsel for the plaintiff in error in this court. He supposes that it confined the tenant to proof of adversary possession under the grant obtained upon his inclusive survey, and deprived him of the right of going behind that patent, and, for the purpose of making out his defence under the statute of limitations, of showing possession under color of title anterior to its emanation. That he had the right to do so will not be denied. For this purpose he was authorized to give in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey made in pursuance of the order; though, as there can be no adversary possession

against the commonwealth, he could not go behind the senior grant. *Shanks v. Lancaster*, 5 Gratt. 110. But there is nothing in the terms or in the effect of this instruction to prevent him from availing himself of all this evidence, if he had chosen so to do. All that it purports to do is to declare the effect of the junior patent obtained upon the inclusive survey, as the foundation for the defence of adversary possession under the statute of limitations: and it informed the jury that its effect was just the same as that of any other patent, and that it only operated as any other patent would, (if the demandant had shown title under an older grant in himself,) to give the tenant a color of title, under which he might, if he could, show an adversary possession sufficient to bar the action under the statute of limitations. That this is strictly correct cannot be doubted. A grant obtained upon an inclusive survey, under the statute, possesses no peculiar or distinctive virtue to support a defence under the statute of limitations, not pertaining to any other grant. For this purpose any grant would equally serve, by affording the necessary show or color of title to which the adversary possession might be referred. Nor is there the slightest ground for supposing that the tenant was restricted, in making out his case, to this particular patent. He was at perfect liberty, after showing it, to go on and show any other instruments under which he claimed title, whether the claim was a good or a bad title, a legal or an equitable title, (*Shanks v. Lancaster, ubi supra*,) and make out his possession, if he could, under any one or all combined.

But in truth the tenant could not have been prejudiced if he had been restricted to his inclusive patent as the basis of the claim of title under which he held possession, because that patent issued in 1797, and it was not necessary, in order to complete the bar under the statute, to carry back the adversary possession

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further than the year 1799. So that if he could make out the necessary thirty year's adversary possession next before the emanation of the writ, it would have fallen under the date of this patent, and this would have furnished the needful color of title, and made out the defence as effectually as if any number of different claims of title had been exhibited.

The instruction to the jury that the possession which would avail the tenant under the statute of limitations must be an actual and continued adversary possession of the land in controversy, or some part thereof, is, I think, strictly correct, nor do I perceive how there can be any objection to it. If the tenant had not had such possession, he could not maintain this defence. The actual adversary possession of the premises in controversy is the very essence of a defence under the statute of limitations. Its effect is to render such possession conclusive in behalf of either demandant or tenant, without reference to the original merits of the controversy, and even against the plainest and most convincing proof of better original title. To say that a party sued for land in his possession is defending himself under the statute of limitations, is exactly equivalent to saying that he is seeking to defeat the action by proving actual adversary possession of the subject in controversy in himself and those under whom he claims, for the period necessary to complete the bar. How he is to make out this possession, whether by proof of actual settlement and occupancy, or of such open, notorious and habitual acts of ownership importing the use and enjoyment of the property, and equivalent to actual occupancy, or by proof of such actual occupation and enjoyment of another portion of the tract claimed by him, of which the disputed premises is also parcel, is a totally different question. This involves other and distinct principles, and especially the enquiry in what sense the rule, that

possession of part is possession of the whole, is to be understood, and of what modifications it is susceptible in its application. To this precise question, as I understand the bill of exceptions, it would seem that the attention of the court was not specifically directed. But if it be susceptible of a different construction, and if we are to understand the instruction as implying that the occupancy and enjoyment by the tenant of a portion of his land other than the parcel in controversy, with whatever claim, could not constitute such a disseizin of the demandant as would enable him to maintain his defence under the statute of limitations, I should still think it strictly correct. The case is one of two patents conflicting in part, occasioning what is called a "lap" or "interlock." The elder patentee under his grant acquires at once constructive seizin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. *Clay v. White*, 1 Munf. 162; *Green v. Liler*, 8 Cranch's R. 229. The junior patentee under his grant acquires similar constructive seizin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seizin of which had already vested in the senior patentee. *Clark's lessee v. Courtney*, 5 Peters' R. 318, 354; *Langdon v. Potter*, 3 Mass. R. 215.

In this state of the case, if the junior patentee settle upon that portion of the land within the interlock, claiming the whole within his boundary, he thereby ousts the senior patentee of his constructive seizin, and becomes actually possessed to the extent of his grant. *Calk v. Lynn's heirs*, 1 A. K. Marsh. R. 346; *West v. Price's heirs*, 2 J. J. Marsh R. 380; *Fox v. Hinton*, 4 Bibb's R. 559. Here possession of part is possession of the whole. But if his settlement be outside of the interlock, there the possession of part is to be construed in reference to the conflict of boundaries,

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and, with whatever claim it be taken, it gives him possession of that part of the land, only, lying without the interlock. Of that within, he does not thereby acquire the possession. The constructive possession which he would have gained if there had been no conflict does not take effect; and there is nothing which can serve to overcome the constructive seizin in deed of the elder patentee, and work an ouster. To effect this, there must be an actual invasion of the boundary of the senior patentee, by some act or acts palpable to the senses, and which would serve to admonish him that his seizin was molested. He is of course presumed to know his own boundary, and if that be invaded by plain, open, visible acts of possession on the part of the other, and he submits or fails to assert his right, an ouster will be accomplished, and he shall be said to be disseized. But if the acts be not of the character above indicated, if they amount to a mere adverse claim, however connected with possession of another part of the land, they will not have that effect. The consequence of a different rule, as justly remarked by Judge Baldwin in *Taylor v. Burnsides*, 1 Gratt. 165, 196, would be that a man might be disseized of his freehold, not only without his knowledge, but even without the possibility of his knowing it. See also *Buford v. Cox*, 5 J. J. Marsh R. 589.

There is nothing in any of the cases cited by the counsel for the plaintiff in conflict with the opinion above expressed. In the cases of *Green v. Litch*, 8 Cranch's R. 229; *Clarke v. Courtney*, 5 Peter's R. 319; *Bradstreet v. Huntington*, Ibid. 402; *Taylor v. Burnsides*, 1 Gratt. 165; and *Overton v. Davisson*, Ibid. 211. the possession relied on was within the limits of the opposing claim, and so the question did not and could not arise. In the case of *Taylor v. Burnsides*, however. Judge Baldwin, in the able and luminous opinion delivered by him, adverts to this question, and expresses

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views with which the opinion here advanced will be found to be strictly coincident: and it would seem to be fully supported by numerous cases. *Burns v. Swift*, 2 Serg. & Rawle 436; *Napier's lessee v. Simpson*, 1 Overton's Tenn. R. 443; *Voorhies v. Bridgford*, 3 A. K. Marsh. R. 27; *Trimble v. Smith*, 4 Bibb's R. 257; *Smith v. Mitchel*, 1 A. K. Marsh. R. 208; *Pogue v. McKee*, 3 A. K. Marsh. R. 128; *Bodley v. Logan's heirs*, 2 J. J. Marsh. R. 254; *Fox v. Hinton*, 4 Bibb's R. 559.

It is objected to the third instruction, first, that it is abstract in its character; secondly, that it is not law. That an instruction presents merely an abstract proposition is certainly a very sufficient reason why a court may refuse to give it; but if given and it state the law correctly, I am not aware that it has ever been held a sufficient cause for reversing the judgment: And though erroneous, it would, as it seems, not be deemed sufficient to reverse. *Hunter v. Jones*, 6 Rand. 541. But the instruction was not of this character; for there was evidence in the case which might involve the question as to the nature of the acts which would amount to an adversary possession. And whatever doubts may formerly have been entertained as to the correctness of the doctrine which it asserts, it must now be regarded as settled in Virginia by the cases of *Taylor v. Burnsides*, 1 Gratt. 165, and *Overton v. Davisson*, Ibid. 211. The authority of these cases upon the points decided by the court has been, I believe, universally acquiesced in by the profession, and I deem it unnecessary to do more than simply to refer to them: They will be found fully to cover the instruction in all its breadth; and indeed the language in which it is expressed would seem to have been adopted from the judgment of the court in *Overton v. Davisson*. If it be said that "the acts of ownership" effecting a change in their condition which shall constitute an adversary possession of lands uncleared and

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in a state of nature, and the character and extent of this change, are not defined or explained, the answer is that the court has conformed to the ruling of this court in the case before referred to, and was not asked to give such definition or explanation. This will perhaps constitute the subject of consideration upon some future occasion. In this case I do not deem it necessary or proper to do more than simply to allude to it.

I think the motion for a new trial was properly overruled. The contest in the case turned upon the statute of limitations; and to make out the defence it was necessary for the tenant to carry back the possession of those under whom he claimed to July 1779. There was no proof of possession of any part of the lands covered by the inclusive patent prior to the year 1800; nor was there proof of any actual possession or entry upon the disputed portion prior to the year 1812. In the view I have taken of the case, there was no disseizin of the demandants' ancestor prior to the year last named. But if even the possession of part of the land without the interlock could be regarded as importing adversary possession of the portion within, and thus working a disseizin, still the evidence fails to carry it back far enough to complete the bar. From the possession in 1800 no inference can legitimately be drawn that the same party had had possession for the previous year. Nor do the circumstances referred to, the making the inclusive survey, obtaining the patent thereon, probable notice of those proceedings to the demandants' ancestor, &c., &c., constitute any proof of such possession as is necessary to work a disseizin. They tend to make out rather a case of adverse claim than one of adversary possession; and they fall within the influence of the rules in *Taylor v. Burnsides* and *Overton v. Davisson*. Nor do they raise, in connection with the possession in 1800, any necessary presumption of previous posses-

sion, because they are all entirely consistent with the hypothesis that the possession had its commencement in the year first spoken of by the witness.

As to the supposed misunderstanding of the instructions by some of the jury: I will remark that while affidavits of jurors will generally be received in support of their verdict, they will not readily be received to invalidate it. The cases in the books upon this subject are numerous; and it is true in the multitude of decisions there will appear to be some contrariety; and quite a number of cases are to be found in which such affidavits have been received for the purpose of impeaching verdicts, and new trials have been sometimes granted. But the leaning of the courts of most approved authority is against the practice of grounding such motions upon them; and a disposition has been manifested greatly to restrict the class of cases in which, upon such affidavits, new trials will be allowed. In the case of *Harnsberger v. Kinney*, 6 Gratt. 287, Judge Allen, delivering the opinion of the court, states strongly the reasons, founded on principles of public policy, for discouraging a resort to evidence of this character. It was a case in which a new trial was asked for on the ground that the instruction of the court had been misunderstood by some of the jury. The Circuit court had set aside the verdict and granted the new trial; and this court reversed the judgment of the Circuit court, and proceeded to render judgment on the verdict. I should therefore feel very reluctant to entertain a motion for a new trial, upon the ground that some of the jurors, as disclosed by their own affidavits, had misunderstood the instructions of the court in a case in which the court before which the trial was had had refused to set aside the verdict as contrary to evidence, and in which, so far as this court could see, full justice had been done.

But in truth, were it not for the statement in the

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bill of exceptions, that the judge himself, if he had been a juror, would have carried the possession back to the date of the inclusive survey, and have found for the tenant, I should have thought there was no ground whatever for imputing any such mistake or misunderstanding of the instruction as is supposed. From the terms in which it is expressed, the Circuit court was of opinion the tenant must show actual possession of part at least of the land within the interlock, as contradistinguished from such possession as he would have acquired if there had been no conflict of boundaries, by taking such possession of part of the land without, and that it must have been held adversely for thirty years prior to the institution of the suit. The proof is clear that he had no actual possession by occupancy or enjoyment of any part within the interlock prior to the year 1812; and there could be no doubt, therefore, if such a possession was required to be proved, that he had failed to make out a bar under the statute. Such an interpretation might very well, I think, be given to the instructions, and they are complained of here because such was their meaning; and I feel some little difficulty in reconciling it with the statement above referred to. But however this be, the instructions, as understood by the three jurors referred to, in my view propounded the law in substance correctly; and I think there is not the slightest ground for disturbing the verdict because of any supposed mistake or misapprehension as to what was really the law of the subject.

There remains to be considered but one other question, and that is as to the effect of the imperfect description of the land in the count, and the variance between it and the verdict as to quantity and boundaries. And on my first examination, I felt some difficulty on this point. Further reflection, however, has served to remove it. The form of the count in a writ

of right under the act of 1819, as prescribed in the act, requires the boundaries of the land to be stated. The count filed attempts to set them out, but those given do not make a diagram that will close, an open line or lines being left between the end of the course S. 80 W. 52 poles, and the beginning corner. But no objection was made for this defect, by demurrer or otherwise; the usual plea was filed and the issue joined on the mere right; and the jury have found a verdict precisely describing the tenement demanded by its exact quantity and specific boundaries. By this means the defect is cured. *Turberville v. Long*, 3 Hen. and Munf. 309; *Lovell v. Arnold*, 2 Munf. 167; *Bolling v. Mayor of Petersburg*, 3 Rand. 563. It is true the verdict describes the land as bounded by seven lines, while in the count the number of lines is eight, and no one of the lines named in the former coincides with any one of those given the latter; and the quantity of land found by the jury is twenty-three acres, one rood and twenty-six poles, while that demanded in the count is twenty acres. But these things are only matters of description; and the jury having found the tenement described by them in their verdict to be the same tenement mentioned in the count, we have to suppose that the description given in the count is a mistaken one; and that the demandants have recovered the precise tenement demanded in the count, though by a different and corrected description.

Upon the whole case, I am of opinion to affirm the judgment.

The other judges concurred in the opinion of *Lee, J.*

JUDGMENT AFFIRMED.

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August 14th.

1. If parties in making a contract use words of definite legal signification, they must be understood as using such words in their definite legal sense.
2. By an agreement in contemplation of marriage, the intended husband bound his estate to pay to the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. **HELD:** This agreement barred her of her dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate.
3. The husband by his will gave to his wife certain personal estate absolutely, and a tract of land for life; but she after his death renounced the will in the mode prescribed by the statute. **HELD:** She is not entitled to take under the will what is thereby given to her: But the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate.
4. The widow having received from the executors two bonds of her son by a former marriage, which he had executed to her husband, in part satisfaction of the amount due to her under the marriage agreement, and having given to them a receipt for the amount, it is a valid payment to her to that extent.

The case is sufficiently stated in the opinion of Judge *Samuels*.

Baldwin and *Stuart*, for the appellants.

Michie and *H. W. Sheffey*, for the appellee.

SAMUELS, *J.* On the 12th of November 1841 Samuel Findley and Elizabeth S. Harnest entered into an agreement of that date, in writing and under seal, reciting in effect that a marriage was shortly intended to be had and solemnized, by the permission of God, between the parties; declaring, amongst other things,

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that it was distinctly understood and agreed, that in the event of said Samuel Findley departing this life first, or before the said Elizabeth, that said Findley bound his heirs, executors, &c., to pay to the said Elizabeth the sum of ten hundred dollars: say about one-half in cash, and the other half in property at a fair valuation price. But if said Findley should live five years or more after the date of their marriage, or the said Elizabeth have one or more children to said Findley, and living at the death of said Findley; in either or both of these last events happening, then Findley bound his heirs, executors, &c., to pay said Elizabeth the further sum of ten hundred dollars, payable as before stated, within six months after Findley's decease, in money, say about one-half, and the other half in household and other property, as it might suit equally for his estate to pay out, and her to receive, which sum or sums were to be considered as in bar of and in full compensation for said Elizabeth's dower; and that said parties agreed that Findley would only have the right to exercise authority over the rents and profits of said Elizabeth's real estate, and the same to use so long as they both lived. This agreement was duly recorded; and immediately thereafter the marriage was consummated. Findley having lived more than five years after the marriage, departed this life May 5th, 1847, leaving his wife to survive.

Findley died leaving a will, which had been written a short time before the marriage, but which contains no reference to that event. Three several codicils are annexed to the will, all written after the marriage. One of these codicils gave to the appellee the personal property she had brought to her husband at the marriage; and in case the testator and his wife should die before Margaret, the daughter of the wife, then this daughter was to have and enjoy the property. Another of the codicils gave to the appellee a portion of a tract

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of land which testator had purchased of J. Bushong, as her dower right for and during the term of her natural life. The will and the codicils annexed were admitted to probat. On the 23d of August 1849 Elizabeth S. Findley, in conformity with the terms of the statute, by deed under her hand and seal, declared that she would not take or accept the provision made for her by the will of Samuel Findley, or any part thereof, and that she did thereby renounce all benefit she might claim under said will; and that she elected to take such portion of the estate of Samuel Findley, in virtue of her right as widow and relict, as the law of the land allowed.

The appellee, Elizabeth S. Findley, thereafter, by bill and amended bill, convened the executors and devisees of Samuel Findley before the Circuit court of Augusta county. The bill alleged the facts above stated, and some others not material to be considered; and the prayer of the appellee is, that she may have a decree for her distributive share in the personal estate of her late husband; that she may have a day in court to elect between the provisions of the jointure settlement and her dower in the real estate of Samuel Findley; and for general relief.

The answer of the defendants admitted the marriage and other allegations of the bill, so far as they were founded on written evidence. They question the right of complainant to distribution of her husband's personal estate, alleging that, upon the true construction of the marriage contract standing alone, her claim to distribution is barred; or if this be not so, yet, construing that contract by the light of surrounding circumstances, as shown by extrinsic proof, they insist her claim is barred.

The case thus presented brings before the court the questions, What rights complainant acquired under the marriage contract? What rights she gave up by that

contract? What rights she took under the will of her husband? To what extent her rights under the will are affected by her renunciation of its provisions?

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It was properly conceded in the argument here that parties, when about to contract the relation of husband and wife, may, by agreement, vary or wholly waive the rights of property which would otherwise result from the marriage. See *Faulkner v. Faulkner's ex'ors*, 3 Leigh 255; *Charles v. Charles*, 8 Gratt. 486; 1 Lom. Dig. 423-4.

By the terms of the marriage contract in this case, the appellee was to have one thousand dollars in the event of surviving her husband; and the like sum, payable six months after Findley's death, if he should live five years or more, and then die leaving the appellee surviving. The husband lived more than five years, and at his death left the appellee surviving, who thus became entitled to the two sums of one thousand dollars each, payable at the times and in the mode provided in the agreement.

The question, what rights the appellee gave up by the contract, was argued with great earnestness by the counsel. On the part of the appellants it was insisted, that she had given up not only her right of dower, but her claim to a distributive share of the personal estate. On the part of the appellee it was insisted, that the right of dower only was intercepted, and that the claim to a distributive share remained untouched.

It may be laid down as a rule of construction established beyond question, that a written contract must be construed by the terms used therein, if plain and intelligible; that extrinsic proof is not admissible for the purpose of adding to, or detracting from, or explaining, or in anywise varying the plain meaning of the instrument itself; that extrinsic proof may be heard only for the purpose of explaining a latent ambiguity or of applying ambiguous words to their pro-

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per subject matter. It may be further laid down as equally well settled, that if parties, in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense. For these positions a large number of authorities were cited by the appellee's counsel: amongst them the cases of *Tabb v. Archer*, 3 Hen. & Munf. 399; *Gatewood v. Burrus*, 3 Call 194; *McMahon v. Spangler*, 4 Rand. 51; *Boyer v. Martin & al.*, 6 Rand. 525; *Ball's devisees v. Ball's ex'ors*, 3 Munf. 279. Wigram, in his treatise on the construction of wills, lays down certain rules, some of which are equally applicable to written contracts. The second of these rules is in these words: "When there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and when his words, so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

Applying these rules to the language of the contract, "*which sum or sums is to be considered as in lieu of and in full compensation for the said Elizabeth's dower*," we must hold that the appellee's right of dower only, properly so called, is barred. That word means an entirely different thing from distributive share. Dower is a widow's life estate in land; a widow's distributive share is a third part of the slaves for life, and of the other personal estate absolutely. The statutes regulating these different subjects call them by different names, and prescribe different rules and incidents

about them. If we suppose, for a moment, that the parties intended to bar the right of dower only, what mode of expression more appropriate for the purpose than that used by them?

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Again: If we suppose that they intended to leave her right in the personal estate untouched, the readiest mode of attaining their purpose was to say nothing about it in the contract. I am of opinion the appellee's claim to distribution is not intercepted by the antenuptial contract between herself and her late husband. See *Stegall v. Stegall's adm'r*, 2 Brock. R. 256; *Ellmaker v. Ellmaker*, 4 Watts' R. 89.

The question next in order is, What effect the will of Samuel Findley had upon the rights of the appellee (his widow) to distribution of the personal estate? This question has occurred in many cases under the law as it stood at the death of the testator; and in every case it has been decided that unless the widow renounced the provision made for her by the will, she could claim nothing more than was given by it. The appellee having renounced the will, is entitled to a distributive share of the personal estate of her husband; her dower in the real estate is barred by the contract entered into before the marriage.

The appellee cannot assert her paramount claim to distribution against the will, and also claim the provision, or any part of it, made for her by the will. Having made her election to take the first, she must give up the last to indemnify the parties who are disappointed by her election. *Mitchells v. Johnsons*, 6 Leigh 461; *McReynolds v. Counts & als.*, 9 Gratt. 242. The appellee should account for the value of her interest under the will in the personal estate brought by her to her husband. She should also give up her life estate in that portion of the land bought of Bushong and devised to her by her husband, and account for the rents and profits thereof, if any, received by her, or

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lost by her want of diligence, if any were so lost. This property and its profits should go to indemnify the legatees who are disappointed by the widow's renunciation.

An error appears on the face of the account taken in the court below for ascertaining the balance to be distributed. That balance will be what remains after paying debts and charges. The amount yet due the appellee on the marriage contract is a debt of Findley's estate, and should be paid before the balance can be properly ascertained.

Without deciding whether the appellee was bound as security for her son, William M. Harnest, in the bond amounting to two hundred and fifty-three dollars and fifty-eight cents, yet, as she voluntarily paid that bond, as well as another bond given by William M. Harnest to Samuel Findley, amounting to fifty-eight dollars and eighty-seven cents, these sums should be charged against her in the account of money due her under the marriage contract.*

The other judges concurred in the opinion of *Samuels, J.*

DECREE REVERSED.

* *Note by the Reporter.*—These bonds had been executed by her son, William M. Harnest, to her husband, and she executed the first as his security. After the death of her husband she received these bonds from the executors in part payment of the amount due under the marriage agreement; and gave a receipt for the amount.

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1. In a bill by a widow for dower in land sold in the life time of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant.
2. W bought land, and gave bond with S as security for the purchase money; and about eighteen months after he executed a deed of trust upon the land and on personal property as a further security. Afterwards he took the oath of an insolvent debtor, and his equity of redemption was sold to T and M, to whom the sheriff conveyed it. T, M and S then conveyed the land with general warranty to J, and he, T, M and the trustee united in a conveyance of the land to secure the purchase money. In a bill by the widow of W, to recover her dower, she sets out these conveyances, and makes all the parties to them defendants. J in his answer asks that if she is entitled to dower, the present value thereof may be ascertained, and that there may be a decree in plaintiff's favor for that amount against his vendors. M and S insist they are only sureties of T. **HELD:**
 1. W having given bond and security for the purchase money, the vendor's lien was not retained; and his widow is entitled to dower in the land.
 2. There cannot be a decree for a specific sum in lieu of dower without the assent of all the parties interested.
 3. That the equities between the defendants do not arise out of the pleadings and proofs between the plaintiffs and defendants, and therefore there can be no decree between them.

This was a suit in equity in the Circuit court of Augusta county, brought by Jane Thompson, widow of William Thompson, against his representatives, the administrator of Thomas R. Blair, Matthew Blair, William C. Snapp and Jacob Michael, to recover her dower in a tract of land then owned and in the possession of Michael. The facts are sufficiently stated in the opinion of Judge *Allen*.

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Baldwin, for the appellant, Matthew Blair.

Hugh W. Sheffey and *Michie*, for the appellee, Jane Thompson.

Stuart, for the appellee, Michael.

ALLEN, *P.* This was a bill filed by the appellee, Jane Thompson, widow of William Thompson, to have her dower assigned to her in a tract of land purchased by and conveyed to her husband during the coverture. It appears that William Thompson purchased the land from Thomas R. Blair as executor of Matthew Blair, and received an absolute conveyance therefor on the 25th of December 1830. The consideration expressed in the deed was two thousand and seventy-five dollars, the receipt of which was acknowledged on the face of the deed. On the 4th of June 1832 William Thompson executed a deed of trust on the land, and on a quantity of personal property, to secure the payment of the deferred installments of the purchase money, for the payment of which he had executed his several single bills, with William C. Snapp as security, payable in six equal annual payments, the first falling due on the 25th of December 1832. Thompson thereafter took the oath of insolvency, and in November 1832 conveyed his equity of redemption to the sheriff, who made a return that he had sold the same to Thomas R. and Matthew Blair, to whom he conveyed it by deed dated the 27th of June 1834. On the same day Thomas R. Blair, Matthew Blair and William C. Snapp united in a deed conveying the land to Jacob Michael, with covenants of general warranty, for the consideration, as expressed in the deed, of two thousand four hundred dollars; and Michael on the same day executed a deed of trust to secure the deferred installments. This deed was signed by both the Blairs, by Michael and the trustee, and, with the other deeds of the same date, duly recorded.

The bill makes the representatives of William Thompson, the administrator of Thomas R. Blair, Matthew Blair, William C. Snapp and Jacob Michael, the purchaser in possession of the land, defendants, and prays that her dower be decreed to her, to be laid off my metes and bounds; and that an account of the rents and profits be ordered; and for general relief.

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Jacob Michael, in his answer, admits the execution of the deed of trust to secure the deferred payments on the land; avers that the deed was executed in pursuance of the original understanding between the parties and William C. Snapp, that the land should be bound for the deferred payments; and insists that the vendor's lien for the unpaid purchase money was not released or discharged as it respected the purchaser himself or his widow claiming dower in the land so purchased after the coverture. But should her claim to dower be sustained, he prayed in his answer that the value of her dower interest should be ascertained in money, and a decree be rendered in her favor directly against William C. Snapp, Matthew Blair and the representative of Thomas R. Blair.

It is said by Chancellor Kent, 4 Kent's Com. 153, "That the taking the note, bond or covenant of the vendee is not of itself an act of waiver of the vendor's lien; for such instruments are only the ordinary evidence of debt. But taking a note, bill or bond, with distinct security, or taking distinct security exclusively by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose on the lien, but upon independent security; and it discharges the lien." *Gilman v. Brown*, 1 Mason's R. 212; *Cole v. Scott*, 2 Wash. 141; *Brown v. Gilman*, 4 Whart. R. 290. So, too, the presumption that the vendor intended to rely on the implied equitable lien is repelled by the vendor's taking a mortgage

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on the property subsequent to the deed of conveyance to the vendee. *Little & al. v. Brown*, 2 Leigh 353. In such case the vendee becomes the owner without qualification at the time of the conveyance; he becomes beneficially seized for his own use; and the wife's title to dower attaches, and cannot be divested by the subsequent incumbrance, unless she concurs therein.

In this case there was the personal security of a third person for the deferred payments, on which the vendor rested from the 25th of December 1830, until the 4th of June 1832, which of itself shows no lien was reserved; and the deed of trust upon that and other property would have superseded it. The purchaser, Michael, has not introduced any evidence to sustain the affirmative allegation of his answer, that the deed of trust was executed in pursuance of the original understanding of the parties and William C. Snapp, that the land should be bound for the deferred payments. The court properly determined by the interlocutory decree of November the 1st, 1848, that the appellee was entitled to her dower, and that commissioners should be appointed to allot and assign the same to her.

The decree furthermore directed the commissioners to report what sum would be a fair annual rent or annuity for the dower estate, and what gross sum in fee, payable *in presenti*, would be a fair equivalent for the plaintiff's dower interest. This provision of the interlocutory decree seems to have grown out of a prayer in the answer of the defendant, Michael, that in the event of the claim to dower being sustained, the value thereof should be ascertained in money, and a decree be rendered directly against his vendors in favor of the appellee. In pursuance of this order the commissioners laid off the dower by metes and bounds, and ascertained the yearly rent; and a report was

made ascertaining the present fee simple cash value of the dower estate: And a final decree was rendered in favor of the appellee for the arrears of rent, and the cash value of the dower estate, against said Michael. And the court furthermore proceeded to give Michael a decree over against his vendors, for the amount so decreed against him; and being satisfied that Snapp and Matthew Blair were only sureties of Thomas R. Blair in the deed and warranty to Michael, liberty was reserved to them, in the event of their being compelled to pay the sum decreed in favor of Michael, to apply for a decree against the estate of Thomas R. Blair; or the said M. Blair was, if he so elected, to be permitted to make a certain offset referred to in the decree.

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From this decree the appellant, Matthew Blair, has appealed. The suit was a simple claim for dower to be laid off and assigned to the plaintiff in the court below, in lands of which she alleged her husband was beneficially seized during the coverture, and for an account of rents and profits. The purchaser in possession, Michael, holding the legal title by deed duly recorded, was the only necessary defendant, the only person against whom the plaintiff was entitled to a decree. She had no privity with or claim against the intermediate parties through whom the legal title may have passed from her husband to the purchaser in possession. In giving the history of her claim, the bill set out the various alienations and made the vendors of Michael defendants, but asked no decree against them. It was for Michael's benefit that they were made defendants, as it gave them notice of a claim for which they might be eventually liable on the warranty in their deed, and so enabled them to unite with him in resisting the plaintiff's claim; but there was nothing in the allegations of the bill which raised any question as between the codefendants themselves. The right of the appellee, Jane Thompson, to have her dower assigned, and the extent of it, was in nowise

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dependent on the transactions between the codefendants. Yet the litigation and delay which the female appellee has been compelled to encounter and submit to has grown out of and been caused by matters to which she was a stranger, and entirely beside the issues raised by the bill and pleadings. The appellant, Matthew Blair, does not seriously controvert her right to have her dower assigned; but files an elaborate answer to show that he should not be held liable on the warranty in his deed to Michael; a matter foreign to the issue presented by the bill, and with which the female appellee had no concern. The final decree not only determines this question as between Michael and his vendors, though no issue had been raised between them, but proceeds a step further, and decides that, as between these vendors, one was principal in the joint warranty and the other two were sureties.

But little is to be found in the English books in relation to proceedings in equity upon the subject of decrees between codefendants. The leading case on the subject is the case of *Chamly v. Lord Dunsany*, 2 Sch. & Lef. 689, decided in the house of lords. The case, according to Lord Chancellor Erskine, was more entangled than any other he ever had to consider; but the general doctrine in regard to such decrees was laid down by Lord Eldon and Lord Redesdale. "Wherever (said Lord Eldon) a case is made out between defendants by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants, and is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter which may be then decided between him and his codefendant. And the codefendant may insist that he shall not be obliged to institute another suit, for a matter which may be then adjusted between the defendants." *Corry v. Caulfield*, 2 Ball & Beat. 255, was an instance of a

decree between codefendants upon evidence arising from pleadings and proofs between plaintiffs and defendants.

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The case of *Taliaferro v. Minor*, 2 Call 190, presents the first instance in which the practice was adverted to in this court. That was a suit by distributees against two administrators for an account and distribution. The report ascertained a balance to be due by one administrator to the estate of the other administrator; and a decree was rendered for such balance by the chancellor. But upon appeal it was reversed, because no contest appeared between the administrators, in the record, nor any account of their separate transactions, except in the statement of the accounts by the commissioner. The principle of the case is that the pleadings raised no issue between the codefendants as to the state of accounts between themselves.

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Roberts v. Jordans, 3 Munf. 488, was an injunction to a judgment obtained by the assignee of a bond against the obligor, upon the allegation of payments to the obligee and assignor. This court directed the injunction to be made perpetual as to such sum only as had been paid to the assignor before notice of the assignment; but gave the plaintiff a decree over against the obligee and assignor for any sums received by the latter after notice of the assignment, as soon as the plaintiff should have paid the judgment. This was not a decree between codefendants, but in favor of the plaintiff against one of the defendants for money improperly received by him on a note he had assigned to a third person.

The case of *Dade v. Madison*, 5 Leigh 401, is similar in principle to the case last cited; a decree over in favor of the plaintiff against a defendant ultimately liable to pay back to the plaintiff money he had been compelled to pay under the order of such defendant in favor of a third person.

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Ruffners v. Barrett, 6 Munf. 207, is to the same effect ; an injunction by the obligor to a judgment in favor of the assignee, upon the allegation of payment to the obligee before notice of the assignment. Upon proof of payment after notice of assignment the injunction was dissolved as to the assignee, but leave was given to proceed against the assignor.

These cases, though referred to sometimes as instances of decrees between codefendants, are in fact cases in which decrees were rendered in favor of the plaintiff against one defendant upon a proper case made against him.

Morris v. Terrell, 2 Rand. 6, was a case of a decree between codefendants. The principal in that case filed a bill against his agent and a purchaser of land from the agent, to set aside a sale for which the agent admitted he had received the purchase money, upon the ground that the agent had no authority to sell. The sale was set aside, the principal restored to his property, and the agent decreed to repay the purchase money received from the purchaser. In that case the authority of the agent to sell constituted the gravamen of the bill. His liability to refund to the purchaser resulted from the establishment of the fact that he had sold without authority ; and the question was directly presented and arose from the allegations of the bill and the proofs to sustain them.

The case of *Mundy v. Vawter*, 3 Gratt. 518, agrees in principle with *Morris v. Terrell*. The bill of Vawter, the substituted trustee, made the purchasers of the land and the previous trustees, and others who had united in a deed to Dillard, defendants, alleging that the sale was without authority. The court so held as to one-fourth of the subject, and gave the plaintiff a decree therefor ; and then decreed over in favor of the purchaser against his grantors, in the order of their liability, upon the ground set forth in the decree, that

the claim of the purchaser to relief upon the recovery from him arose out of the decree against him upon the pleadings and proofs between the plaintiff and his grantors. There, as in the former case, the authority to sell constituted the stress of the case, and upon that depended the liability to refund. Upon that question the issue was fully made up by the allegations of the bill, to which the defendants ultimately made responsible to their vendee and codefendant had an opportunity of responding by their answers. In another branch of the case of *Mundy v. Vawter* the court refused a decree in favor of Norvell against his codefendants, because the pleadings did not make a proper case for such decree.

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In the case of *Templeman v. Fauntleroy*, 3 Rand. 434, the plaintiff charged that Fauntleroy, an absentee, was indebted to him, and that the home defendant was indebted to Fauntleroy; and being a foreign attachment, he sought satisfaction of his debt out of the debt alleged to be due by the home defendant to the absentee. The fact of indebtedness was directly alleged in the bill and established by the report of the commissioner; and though the plaintiff took his decree against the absentee alone, and waived a decree against the home defendant, it could make no difference to the latter whether he should be decreed to pay to the plaintiff or to his codefendant and creditor, the absentee. A payment to either would have discharged his debt. The existence of the debt being alleged, the case between the defendants was fully made out by evidence arising from the pleadings and proofs between the plaintiff and defendants.

In *Toole v. Stephen*, 4 Leigh 581, a judgment in favor of the assignee against the maker of the note was enjoined on the ground of usury. It was insisted in this court, upon the authority of *Chamly v. Id. Dunsany*, that the court below erred in not giving the

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assignee a decree against the assignor, a codefendant, when the judgment of the assignee was enjoined; but this court affirmed the decree. In *McNeil v. Baird*, 6 Munf. 316, the plaintiff sought to enjoin the endorsee of negotiable notes from proceeding to enforce them, on the ground of the failure of consideration and fraudulent concealment by the payee. The endorsee claimed to be an endorsee for value without notice; but, as against the payee, the equity in the bill was fully supported by the testimony. The court held that as both maker and endorsee were before the court, the endorser and payee should be first subjected to the payment of the notes; he being the principal debtor. In this case the liability of the payee arose out of the failure of the consideration and his own fraud; and this constituted the gravamen of the charge contained in the bill. And it appearing by his own answer, according to the report, that he had endorsed the notes for value, the case as between himself and his codefendant was fully made out by evidence arising from the pleadings and proofs between the plaintiff and defendant; it being a case in which the plaintiff, in the event of his being compelled to pay the debt, would have been entitled to a decree upon the pleadings and proofs against the said defendant; and in fact the decree contained a provision for such decree in favor of the plaintiff.

In *Allen & Irvine v. Morgan's adm'r & als.*, 8 Gratt. 60, the plaintiff, a judgment creditor of the intestate, filed a bill against the administrator of the debtor and his official sureties, charging a *devastavit* by the payment of debts of inferior dignity. Some of the sureties in their answers insisted that the *devastavit* had been committed by the fraudulent application of the assets by the administrator to the payment of a debt due to another of the sureties; and as the administrator was insolvent, they contended that this surety should be primarily liable, or that the other sureties

should have a decree over against him. This court held that although the plaintiff was entitled to a decree against all the defendants, there was nothing in the allegations of the bill and pleadings which raised an issue between the codefendants, so as to let in evidence as to their liabilities as amongst themselves, and that it was not therefore a proper case for a decree between them.

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The case of *Morris v. Terrell*, 2 Rand. 6, and *Mundy v. Vawter*, 3 Gratt. 518, are the only cases in which the plaintiff was not entitled to a decree in any event against the defendant, as against whom a decree was made in favor of a codefendant. In *Templeman v. Fauntleroy*, and *McNeil v. Baird* the plaintiff was entitled to a decree against the defendant charged in favor of the codefendant. In each case the liability of the party and extent of it arose from the facts which entitled the plaintiff to any relief. They were, therefore, necessarily charged in the bill; the defendant had an opportunity of responding in his answer; and the evidence applied directly to the issue thus made up by the pleadings.

Nothing of that kind appears in the present case. The widow was entitled to her dower in the lands, to be assigned by metes and bounds, and to an account of rents and profits. The court had no authority to decree a sum in gross in lieu of dower, except by the assent of all parties interested. She had, therefore, no right to a decree against the defendant, Matthew Blair, and his associates, who conveyed to the purchaser, Michael. And her right to a decree against him as the owner of the land could not be affected by the contracts and dealings between him and his vendors. Whether they were legally liable upon their warranty, and the extent of that liability, and how far that legal liability might be affected by the matters set out in the answer of Matthew Blair, were questions not arising upon any of the allegations of the bill; and proof

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in relation thereto could not have applied to any issue made by the pleading.

In *Hubbard v. Goodwin*, 3 Leigh, 492, 522, Tucker, president, observed, "That the practice of decreeing between codefendants should not be extended further than it had already gone. A defendant who answers the plaintiff's bill does not always go on to state his own case as between him and his codefendant. There is no issue made up, nor any provision for taking their testimony in reference to the peculiar matters in difference between them. And hence in many cases the contest between them cannot come fairly before the court." And he further remarked, that a decree between codefendants was proper in no case where the plaintiff was not entitled to a decree against both or either. The cases of *Morris v. Terrell* and *Mundy v. Vawter*, *ubi supra*, were cases in which the plaintiffs did not seek decrees against the defendant who was charged in favor of the codefendant; but they were different in all their circumstances from the case under consideration.

I think the decree here between the codefendants extends the practice further than any of the cases justify, and was unwarranted under the pleadings and proofs as applicable to them.

I also think the court erred in decreeing a gross sum against the purchaser in lieu of dower. As has been remarked, such a decree could be authorized only by the assent of all the parties interested. *Herbert v. Wren*, 7 Cranch's R. 370; *Wilson v. Davisson*, 2 Rob. R. 384. The appellee, Jane Thompson, did not pray for such a decree in her bill. The defendant, Michael, asked that it should be ascertained in money, and a decree over be rendered in her favor against his vendors. It was ascertained in money, and a decree was rendered against him for the amount in her favor; and there was a decree over in his favor against the appellant. From this decree neither the widow nor Michael

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have appealed; and if they were the only parties, their assent to the conversion into a gross sum might be presumed. Michael no doubt acquiesced because it was substantially a decree against his warrantor for the amount of the widow's claim. But as the appellants never assented to such a conversion of her claim into a gross sum, the decree would not bind them or furnish the measure of their liability in an action upon the warranty. I think, therefore, a reversal of the decree as to them draws with it a reversal of the entire decree, so as to leave the purchaser at liberty to proceed against his vendors upon their warranty for such damages as he may show himself entitled to. I think the decree should be reversed with costs against the appellee, Michael; and the case remanded with instructions to enter a decree in favor of the appellant, Jane Thompson, for her dower as laid off and assigned to her by the commissioners under the interlocutory decree of the 1st of November 1848, to whose report there has been no exception; and also for the arrearage of rent ascertained by the report of the commissioner, to which there has been no exception; and for a decree for an account of rents and profits accrued since the 1st of June 1849, up to the period of entering the decree aforesaid.

MONCURE, *J.* concurred in the opinion of Judge *Allen* as to the dower. He doubted whether it was a proper case for a decree between codefendants; but under the circumstances of the case he thought it was too late to object to it, and that the decree should be affirmed.

The other judges concurred in the opinion of *Allen, P.*

DECREE REVERSED.

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Testator says, "Having implicit confidence in my beloved wife F, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said beloved wife F with the right and title of all my property, both real and personal, to dispose of to each of my children in any way she may think proper and right." By a subsequent clause of the will it was provided that if F died without making a will, the children should have an equal distribution of testator's estate. **HOLD:**

1. That F has an unlimited discretion as to the time and manner of distributing the property among the testator's children. She may distribute it, or any part of it, in her life time or at her death, by any instrument adapted to pass property of the kind which she distributes; and she may distribute to either child such kind of property as she may choose to give to him or her.
2. That F may sell and convey the whole or any part of the property, and distribute the proceeds of sale.
3. That F having a discretion as to the time and manner of distribution, a purchaser of land from her is not bound to see to the application of the purchase money.
4. **QUERE:** If each child is entitled to have ultimately an equal share of the estate.

At the June term of the County court of Augusta in 1835, the will of Samuel Steele, junior, was admitted to probat, and Frances Steele, his widow, who was named executrix therein, qualified as such. The second, third and fourth clauses of the will are as follows:

" 2d. Having implicit confidence in my beloved wife, Frances Steele, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said beloved wife Frances with the right and title of all my property, both real and personal, to dispose of to each of

my children in any way she may think proper and right.

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"3d. If my wife Frances should depart this life without making and publishing her last will and testament, then my son James Henry shall account to my estate for the sum of one thousand dollars, which has been expended upon his education, &c., over and above any other children.

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"4th. If my said wife Frances should depart this life without making her will as aforesaid, it is my desire that all my young children shall have a good English education, and that each one shall have an equal distribution of my estate, except my son James Henry, who shall account as aforesaid out of his share."

The testator left six children. In 1841 Mrs. Steele entered into a contract in writing with Jesse J. Levisay, by which she contracted to sell to him a tract of land in the county of Greenbrier, a part of Samuel Steele's estate; and she bound herself to convey the same to him with general warranty upon the payment of the purchase money. Levisay paid all but the last installment of the purchase money; and a question being started as to the power of Mrs. Steele to sell and to make a good title, he filed his bill in the Circuit court of Augusta county, in which he stated the will of Samuel Steele, the sale to himself by Mrs. Steele, and his payment of nearly all the purchase money. That the money he had paid had been divided among all the children but John H. Steele; and that he was therefore unwilling to unite with the other heirs and the executrix in making a sufficient deed to the plaintiff:—And that the other heirs were only willing to convey with special warranty. And making Mrs. Steele and the children of Samuel Steele defendants, he called upon her to state by what title she held the land, and what interest she claimed in it; what disposition she had made of the purchase money

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paid to her; and how she had disposed of the rest of the estate of her husband. And he prayed that the court would ascertain and settle the rights of the parties in the land purchased by him, and decree to him a good and sufficient title according to the contract; and for general relief.

Mrs. Steele answered, admitting the contract, and that the plaintiff had paid nearly all the purchase money. She insisted that she had a perfect right to sell and convey the land; and she says that she had always been ready to make the conveyance so soon as the plaintiff paid the balance of the purchase money. She admitted that the will of her late husband did not constitute her the absolute owner of the whole estate; but she insisted that it conferred upon her the legal control and title, subject to a fair distribution among her children; a trust for which she was responsible to her children, but to no other person. She therefore declined to account to the plaintiff for the manner in which she had disposed of the purchase money received of him, or the application she intended to make of that yet to be paid, further than to say that, in what she believed to have been the sound exercise of the discretion vested in her by the will, she had thought it proper to sell the land purchased by the plaintiff, and to use the proceeds in the advancement of her children in a full and fair manner, such as she believed to have been contemplated by her husband, and to be just and expedient under the circumstances of the family.

John H. Steele and two others of the children answered, insisting upon an equal distribution of the estate; but not objecting to the sale, if the purchase money was thus distributed.

The cause came on to be heard in November 1851, when the court held that Frances Steele took under the will of her husband a life estate for her own use

in the estate, with a power of distributing it equally by will at her death among the children of the testator; that her power of sale was confined to the personal estate, and was only such as she might lawfully exercise as executrix; that as devisee she had a power of distribution or appointment only among certain persons, the children of the testator, but not of sale to strangers; and that if she could not conveniently distribute or appoint without selling, she must apply to a court of equity for power to sell. And even if she had the power of sale, the purchaser was bound to look to the application of the purchase money.

And the sale not being objected to by any of the children of the testator, if the proceeds were to be distributed equally, and the court seeing no objection to it, the sale was confirmed, and Frances Steele was decreed to convey the land to the plaintiff with general warranty; and that the other defendants should release in writing endorsed on her deed all their claim in and to the land so conveyed. That upon the filing said deed among the papers, duly authenticated, for record, the plaintiff should pay to Frances Steele the balance of the purchase money, after deducting his costs in this cause; and that she should distribute the proceeds of said sale equally among all the children of her testator, so as to place each child on an equal footing with the rest. From this decree Mrs. Steele applied for and obtained an appeal to this court.

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Baldwin, for the appellant, insisted :

1. That by the second clause of the will of Samuel Steele, Mrs. Steele was placed *in loco parentis* to his children; and that she had full power and authority to sell and convey the property and distribute the proceeds of sale among the children, when and in such proportions as she deemed just and reasonable under

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the circumstances. He cited on this question *Kenworthy v. Bate*, 6 Ves. R. 793; *Long v. Long*, 5 Id. 445; *Bullock v. Fladgate*, 1 Ves. & Bea. 471; 1 Sugd. on Powers 508-510; 2 Lomax Dig. 169, 170; 4 Kent's Com. 345.

2. That there being in this case a discretion in the trustee as to the application of the purchase money, the purchaser was not bound to see to its application. 2 Story's Equ. Jur. § 1134; 1 Lomax Dig. 245.

3. That the will does not require an equal distribution among the children by Mrs. Steele: And that the fact of conferring the power to distribute implies the power to appoint unequally. At law the giving a penny is sufficient; but it is held in equity that the appointment must not be illusory. 2 Lomax Dig. 170-172; 1 Sugd. on Powers 568; *Maddison v. Andrew*, 1 Ves. sen. 57; *Kemp v. Kemp*, 5 Ves. R. 855.

H. W. Sheffey and *Michie*, for the appellees, insisted:

1. That Mrs. Steele had no power to sell the estate, but that her power was confined to a disposition by will; that it was certain the will gave no express power to sell; and there was nothing in the will from which such a power might be inferred; but, on the contrary, the third and fourth clauses showed that the testator contemplated the disposition of the property by her will. They cited *Carrington v. Belt*, 6 Munf. 374; *Knight v. Yarbrough*, Gilm. 27.

2. That equality of benefit to the children was plainly intended. The testator, by the provisions of the third and fourth clauses, showed what he considered a full and fair disposition of his property: And the phrase "in any way she may think proper" referred to the mode in which the property was to be distributed, and not to the proportion which was to be given. They cited *Harrison v. Harrison*, 2 Gratt. 1; *Briggs v. Penny*, 8 Eng. Law and Equ. R. 231; 2

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3. That there being no discretion vested in Mrs. Steele, but she being bound to distribute the estate equally among the children, the purchaser was bound to see to the application of the purchase money. 3 Sugd. on Vend. 96-112.

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DANIEL, J. The main questions to be considered are: First, whether the will of the testator confers upon his wife Frances the power to sell the real estate? And if so, secondly, whether the purchaser is bound to see to the application of the purchase money?

The second clause of the will, taken apart from the other provisions, seems to me to indicate a design on the part of the testator to leave his wife, after his death, clothed with all the control over his estate which he had himself enjoyed in his life time, subject only to the restriction that his children, as a class, should become ultimately the beneficiaries of the whole, and that each of his children should receive a portion of the estate.

The expressions of confidence in respect to his wife's distribution and disposition of the estate, whilst they raise a trust in favor of the children, impose no limitation on the discretion of the donee of the power, as to the time or mode of executing it. Under this clause, the appointment might be made by Mrs. Steele in her life time, by the performance of any act or the execution of any instrument by her which would be sufficient to pass property of the like kind belonging to her absolutely; or she might defer the appointment till her death, and make it by last will and testament. I think it equally clear that she is left free to select the species of property belonging to the estate to be appointed to the several children; that she might give

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land to one, slaves to another, and money or bonds to a third. The power to sell the estate, or any portion of it, is not given expressly, but is, I think, fairly to be inferred from the obvious scheme of the testator and the broad terms used in relation to the distribution and disposition of the property. A power to convert land into money or money into land or other species of property, and thus to shape and adapt the intended bounties to the wants and conveniences of the several beneficiaries, falls so manifestly within the scope of the broad and parental control with which it was the design of the testator to leave his wife invested after his death, that it seems to me to deny it would be to run counter to the rule which makes the intention of the testator the main guide in the construction of his will.

The courts have been liberal not only in sustaining a substantial execution of the power in cases where the appointment has been perfected, but also in inferring the power to sell when essential to the full execution of the trust, in cases where efforts have been made to arrest the donee of the power in the course of his proceeding to execute it. Thus in the case of *Roberts v. Dixall*, 2 Equ. Cas. Abr. 668, where a father had a power to *appoint and divide an estate* among his children in such proportions as he should think proper, and bequeathed a legacy of three thousand pounds to one of them as a charge upon the estate, Lord Hardwicke held that the power was in substance well executed. "It is true (he said) the direct terms of the power are not pursued, but the intent and design of it are. It is admitted that the father *might have appointed part of the estate to be sold* and the *money raised by such sale*; and what is done is exactly the same thing; this court may order a sale."

So in *Long v. Long*, 5 Ves. R. 445, where a father was clothed with a power to charge an estate with the

payment of such sum or sums of money, for the benefit of such child or children, payable in such proportions and at such time or times as he should by deed or by will direct, limit and appoint, the power was held well executed by a will directing a sale and appointing the money.

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And again, in the case of *Kenworthy v. Bate*, 6 Ves. R. 793, where an estate was devised to the use of such child or children as the father should, by his will, give, direct, limit and appoint, the power was held to be substantially executed by a devise by the father to trustees to sell, and an appointment of the money produced by the sale. The master of the rolls said, it having been decided that a power to charge included a power to sell, it would be difficult to maintain that a power to give did not include a power to sell for the purpose of giving the money instead of the land.

In the case of *Winston v. Jones, &c.*, 6 Alab. R. 550, the will was, in many of its features, like the one here, and the question whether a power of sale was given was considered in immediate reference to its bearing on the rights and responsibilities of the purchaser. The decision in that case is, therefore, more directly applicable to the state of things in this. The will in that case, after providing for the payment of the testator's debts, and giving one-third of the real estate to his wife for life, proceeds: "Now it is my will and desire that, after the payment of all my just debts and allotting to my wife her portion, to add to the residue of my estate of every description the sum of one dollar value of property conveyed in trust for the use of my daughter, Sarah W. Washington, and to divide the sum total, after making such addition, into seven parts; and I do hereby direct my executors to distribute and pay over the residue of my estate, both real and personal, in the following manner, to wit: After

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deducting from one of said seven parts the said sum of one dollar conveyed for the use of my daughter, Sarah W. Washington, to pay over to said trustees the residue of said portion, to be held by them in like trust for her use, &c., and to pay to my other children (naming them) each one-seventh part of the residue of my estate as aforesaid," &c.

The executors sold a tract of land belonging to the estate of the testator, and received the purchase money; but having delayed to make the conveyance, the purchaser filed his bill seeking to rescind the contract, and for general relief, mainly on the ground that the will did not confer on the executors the power of making sale of the real estate of their testator. The bill was dismissed by the chancellor on demurrer; and the Court of appeals affirmed his decree.

The court held that no precise form of words was necessary to the creation of a power of sale: If the intention to confer the power was apparent, to enable the executor to execute the trusts of the will, it would be inferred. They said that the use of the terms *add to the residue of his estate of every description* the sum of one dollar, &c., and, after making such addition, to *divide* the sum total into seven parts, and to *distribute and pay over* the residue of the estate, *both real and personal*, &c., was persuasive that the prevailing idea in the testator's mind was that of a sum of money, which might be added to, divided and paid over. It ought not to be overlooked (they further said) in construing the will, that an entire plantation is more valuable as a whole than the aggregate of all its parts would be if divided; and that the process of selling land so circumstanced, for the purpose of more equal distribution, is common in the country; the power being lodged with the County court, and with which all persons were familiar. The probability, therefore,

was, that the testator was merely providing by his will for doing that which he knew would be done on application to the County court.

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Much of the reasoning on which the decision in that case was rested is, I think, applicable to this. And whilst there are no terms employed in the clause of the will under consideration which, in their ordinary sense, negative the idea of a distribution of the estate in kind, the terms "*to dispose of* to each of my children *in any way she may think proper and right*," are, I think, sufficiently broad to confer a discretionary power not only in respect to the shares and proportions in which the estate is to be distributed, and the act or instrument by which it is to pass, but also to the kind, form or nature of the property which may be given ; as whether real estate or personal chattels, or the proceeds of both or either, in the shape of bonds or money. That these terms were designed to confer such a power is, I think, rendered more probable when they are read in connection with the terms "knowing that she will distribute to each of my children in *as full and fair a manner as I could*."

It has been held, that when the intention is clear, a power may enable the disposition of a fee, although no words of inheritance are used ; as where a testator gives a power to sell lands, the donee may sell the inheritance, *because the testator gives the same power he himself had*. 1 Sugd. on Powers 501. This was decided in the case of *Liefe v. Saltingstone*, 1 Mod. R. 189. The devise was to the testator's wife for life, "and by her to be disposed of to such of my children as she shall think fit." It was held by one of the judges, that the wife had power to dispose of an estate for life only, because if the testator had said, *I dispose of it to my son*, it would have been but an estate for life : But a majority of the court held otherwise, as there was a difference (they said) between the devise

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of an interest and a power; and they granted that if the testator had said, *I dispose of it to my son*, it would have been but for life; *but here the testator gives a power to dispose, which seems to imply such a power as he himself had, which was to dispose of the fee.* Ibid. 503.

It is true there is no question here as to the quantity of estate, or whether for fee or for life, which may be given under the power; yet the reasoning upon which the decision in the foregoing case is founded seems to me to be not without force as applied to this. When the testator, in clothing his wife with such broad powers, as must be conceded under any reasonable construction of the clause in question, employs language susceptible of a construction which (without violence to the ordinary import of the words) would carry the power of sale, and this, too, in close connection and association with the idea of his own power and control over the estate, it would seem to be in accordance with the spirit and reasoning of the foregoing case to hold that he designed to make his own power and control the measure or standard of that which he was conferring on the wife, subject only to the restriction already mentioned; that, in conferring such a broad discretion, he did not mean to withhold a power which might be so essential to its proper exercise, to wit, a power to bestow the gifts in such shape as would, in the judgment of his wife, probably be most advantageous to the several objects of his bounty.

Whether the third and fourth clauses of the will are to be taken as restrictions on the powers of the wife in respect to the shares or proportions in which the estate is to be distributed, and as requiring that *ultimate* equality is to be the rule of such distribution, is a question which, in the view I take of the case, it is not necessary for us to decide. I think it clear, that in making provision for the manner in which the estate

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should be apportioned in the event his wife should die "without making or publishing her last will and testament," the testator did not mean to point to such last will or testament as the only instrument or means by which his wife might dispose of his intended bounty. It is true that the express grant of a power as to the disposition of the estate, which the donee would have had without such express grant, has in many cases been taken as indicative of an intention to confine the donee to that power, on the ground that such express grant would otherwise be supererogatory. But to give the will such a construction here would be to destroy that scheme of placing the wife in his stead, of conferring on her a parental control, and clothing her with the power and means of advancing the interests of the children, as and when they might in her judgment require aid and assistance, which is so obvious on reading the whole will.

It is to be observed, too, that the power to make the appointment by last will and testament is not given in express and direct terms; and if that was the only mode of appointment in the mind of the testator, it is difficult to suppose that he would not have given more prominence to a provision so directly in conflict with the otherwise apparent general intention of the will.

In the case of *Grace v. Wilson* the inference in favor of restricting the appointment to a devise was far stronger than here; and yet it was held that the power was general. In that case Thomas Grace by his will gave to his wife, Mary Grace, four thousand pounds, or whatever surplus might arise after the moiety left to his two minor children, subject to a proviso therein contained (that is to say) that she should enjoy the interest thereof for her natural life, and *dispose of the same to such of her children as she should devise and think proper*. It was insisted that the power was confined to a will. In favor of the

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contrary construction *Tomlinson v. Dighton*, 1 P. Wms. 149, and other cases were relied on, and the case was distinguished from *Doe v. Thornley*, 10 East's R. 438; and the case was decided accordingly. Sir William Grant was clearly of opinion that the power was not confined to a will. If the devise had been to her for life, and then to devise as she might think proper, (he said,) then the word devise would have admitted but of one sense; but here it is, as she shall dispose, which admits of two constructions, and thus means as she should think right. Suppose you translate devise, as she shall bequeath by will; how then would it read? To dispose thereof as she shall bequeath by will and think proper; therefore she has a general power.

I have taken the statement of the case from Sugden on Powers, vol. 1, p. 271. Take the language of the will here, providing for the event of the wife's dying without a will, in connection with the preceding clause, and the inference of a general power from the whole is much more obvious than in the case just cited.

If the views I have already presented be correct, little remains to be considered in order to dispose of the only other question in the case necessary to be decided, viz: Whether the purchaser is bound to see to the application of the purchase money. For even upon the supposition that the testator designed ultimate equality in the gifts to his children, (as to which I express no opinion,) the wife is left free to sell the estate if she thinks proper, and to make advancements to the children in money or property, from time to time, as she in her discretion may deem best. I know of no rule which would involve the purchaser in the performance of a trust so broad and complicated, and requiring such a time for its final consummation. The general rule is, I think, clearly the other way; for when the trusts are defined, and yet the money is not merely to be paid over to third persons, but is to be

applied by the trustees to certain purposes, which require, on their part, time, deliberation and discretion, it seems that the purchaser is not bound to see to the due application of the purchase money. As where it is to pay all debts which shall be ascertained within eighteen months after the sale ; or where the trustees are to lay out the money in the funds, or in the purchase of other lands on certain trusts. 2 Story Equ. Jur. § 1134.

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Upon the whole, it seems to me not only that a sale of the real estate, followed by an appointment of the proceeds thereof to the children, should be sustained by a court of equity as a substantial execution of the powers under the will, in accordance with the principles declared in the cases of *Roberts v. Dixall*, *Long v. Long*, and *Kenworthy v. Bate*, but that upon the payment of the purchase money by Levisay to Mrs. Steele, he would stand discharged of all other duty ; and on receiving the conveyance which she has stipulated to make, he would be invested with a title to the land he has purchased, which would be available to him as well at law as in equity.

I think, therefore, that Levisay has shown no case for the interposition or aid of a court of equity ; and that the decree rendered should be reversed, and the bill dismissed : But as the questions raised by the bill are not free from doubt, it should be dismissed on the terms of the plaintiff's paying only his own costs.

The other judges concurred in the opinion of *Daniel, J.*

DECREE REVERSED.

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Term**BAILEY v. JAMES.**Absent *Daniel, J.*

August 22d.

1. Where the contract for the sale of land is entire, for a specific sum of money, and the title to a part of it fails from a cause of which both vendor and vendee were ignorant, it is ground for the rescission of the whole contract; but the vendee cannot insist upon a partial rescission.
2. In such a case, if the vendee declines to rescind the contract, he must pay the whole purchase money.
3. Upon a bond to pay the purchase money of land, but with a provision that upon the vendee's failure to get the legal title from a third party the contract of sale shall be void, the vendee having been let into possession and continuing to hold, and himself neglecting to get in the title, he shall pay interest.
4. The vendor having but an equitable title, and only selling his interest in the property without warranty, and authorizing the vendee to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him.

This was an appeal from a decree of the Circuit court of Wood county, rendered in September 1851. in a cause in which John James was plaintiff and Charles P. Bailey was defendant.

In the year 1797 or 1798 John James the elder purchased from Joseph Spencer a tract of between seven hundred and eight hundred acres of land in Wood county, and received a title bond for the title. He died, as the bill alleges, in or about 1800, leaving several children and heirs, of whom each was entitled to one-seventh of the land. On the 8th of July 1803 John Gillispie and Esther, his wife, who was one of the heirs, entered into an agreement to sell to John James, another of the heirs, their interest in the estate

of John James the elder, in consideration of eighty dollars. And on the 19th of January 1804 James purchased of Seth Bailey and Mary, his wife, another of the heirs, their interest, for the price of one hundred and sixty dollars. The wives of Gillispie and Seth Bailey signed the instruments evidencing the contracts; but there seems to have been no regular conveyance or privy examination, and the contracts could only be effectual in transferring the life interests of the husbands. John James the younger resided in Ohio, and was there visited by the appellant, his nephew, who, on the 31st of July 1832, entered into a contract with him for the purchase of his interest as heir, and the interests he had acquired under the executory contracts aforesaid with Gillispie and wife and Seth Bailey and wife. The agreement executed by James to Bailey recites, amongst other things, that for and in consideration of three hundred dollars in hand paid he sells all his right, title, claim and demand in said land, being the land sold to John James by Joseph Spencer, and descended to and acquired by John James, one undivided seventh as a child and heir of John James the elder, and two other undivided sevenths by purchase from Gillispie and wife and Bailey and wife; and he further covenanted to give the appellant immediate possession of the land; and authorized him to acquire the legal title to the land, by virtue of Spencer's bond, from his heirs.

On the same day the appellant executed his bond to James for three hundred dollars, with a condition reciting the purchase in nearly the same terms as the agreement; and with a further provision, that if the appellant should not succeed in setting aside a decree obtained in the County court of Wood in the name of Joseph Spencer against John James' heirs, and should not succeed in acquiring the legal title from the heirs of Spencer, then the obligation to be void; but if he

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should succeed, then to be valid. The agreements with Gillispie and wife and Seth Bailey and wife seem to have been delivered to the appellant, as he filed them as part of his exhibits with his answer in another suit brought against him by Gillispie and wife, heard together with the present case.

In some short time after the sale and transfer as aforesaid to the appellant, Gillispie and wife brought suit against the appellant and the heirs of John James, asserting their right to their one-seventh of the land; and alleging that the contract between them and John James was executed when they were both under age. The appellant answered, insisting on the right acquired by his purchase from John James; and furthermore contending that if the contract should be annulled, the complainants asking equity should be compelled to refund the eighty dollars paid by James, which he, being substituted to the place of his vendor, would be entitled to receive.

About the same time or shortly after Gillispie and wife instituted their suit, the bill in this case was filed by the appellee against the appellant, in which, after setting out the contract between himself and the appellant, and averring that the decree referred to in the bond and agreement had been rendered inoperative, and though no deed had been made by Spencer's heirs, yet possession had been held under the title bond for thirty-five years, which was supposed to be a good title, he charges that the appellant does not intend to attempt to get a deed, but held and enjoyed the land and refused to pay the three hundred dollars or cancel the contract. The bill asked that the contract be rescinded on the ground of fraud, or because of the failure of the appellant to comply with it; or, if it could not be rescinded, that the land should be subjected to the payment of the purchase money.

The appellant in his answer admits that he was in

possession of the land, but resisted payment for it, because, as he alleged, Spencer's heirs were seeking to subject the land to the payment of purchase money said to be due by John James the elder ; and also upon the ground that Gillispie and wife and Seth Bailey and wife refused to confirm the sales of their undivided interests aforesaid : And he denied the right of the court to rescind the contract.

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The cause, together with the cause of Gillispie and wife, came on to be heard together on the 17th of February 1847 ; and it appearing that the suit instituted by Spencer's representatives had been dismissed on the 25th of March 1846, a copy of the decree dismissing the said suit being filed as an exhibit, whereby the decree in favor of Spencer's representatives could not be enforced ; but it further appearing that the appellee could make no title to the share of Gillispie and wife, because in that suit, heard at the same time, the court had annulled their sale, upon the ground of infancy, the court gave the appellant his election to rescind the contract or pay the entire purchase money. Upon his failure to elect to rescind, the court directed the sale of the one-seventh, the share of said John James, for the payment of the entire purchase money. The land was sold ; and upon the report of the sale, a decree was rendered against the appellant for three hundred dollars, with interest from the date of the contract, to be credited by the net proceeds of sale. From this decree the appellant has appealed.

Price, for the appellant.

Fry, for the appellee.

ALLEN, *P.*, after stating the case, proceeded :

It is objected by the appellant's counsel that the court erred in not decreeing a deed from the vendor to the vendee. The vendor had not the legal title. This

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was known to the vendee, and the vendor merely sold his equitable interest under the title bond, and authorized and empowered the vendee to acquire the legal title from Spencer's heirs. The obligation devolved on the appellant to institute proper proceedings to get in the legal title, if he had deemed it of any importance to him. He was no doubt content to rest on the title bond executed more than fifty years prior to the final decree in this cause, and the possession held under it by himself and those under whom he claimed. His default in not getting in the legal title furnishes him with no protection against the payment of the purchase money.

As to the decree referred to in the condition of the bond, it appears from the decrees in this case and the case of Gillispie and wife against the appellant and others, that the said decree has been rendered inoperative by the decree of the same court of the 25th of March 1846, in the case of Spencer's administrators and heirs against John James, &c.

It is further insisted, that the appellant purchased three-sevenths of the land and gets but one seventh; that Seth Bailey and wife have not conveyed; and that Gillispie and wife have, by the decree rendered in their favor, annulled their contract of sale to the appellee, on the ground of infancy. The appellee agreed to sell all his right, title and interest in and to three undivided seventh parts of said land, one being his own undivided equitable interest as an heir; the other two undivided interests he claimed by purchase as aforesaid; and the contracts of purchase were delivered over to the appellant, and are filed by him as evidence of the interests he acquired in the land, with his answer to the bill of Gillispie and wife. He saw, therefore, when he contracted, the extent of his vendor's interest. He required and received no covenant of warranty. He knew, or is presumed to have known,

that the contracts of the husbands would not pass the equitable estates of their wives, and that they were effectual only to pass the life estates of the husbands. He agreed to pay for the absolute interest of James, as heir, to one-seventh, and these interests acquired by the contracts with Gillispie and S. Bailey, a specific sum.

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The contract was entire, and there is nothing on the face thereof from which it can be ascertained at what price the different interests were valued. In relation to the one-seventh, the interest of John James, there is no dispute or controversy. Nor is it shown that the appellant has not obtained all that he was entitled to under the contract with S. Bailey and wife. It does not appear that the validity of this contract has been impeached, or that the appellant has been disturbed in the enjoyment of what the contract vested in John James, and which the latter sold to him. Seth Bailey and wife, by the contract of January 1804, merely sold and relinquished their equitable interest to the appellee; nor did the latter, by his agreement, covenant with the appellant that they should make any further conveyance. But in regard to Gillispie, though there was no covenant or warranty as to the title of the thing contracted to be sold, there was an implied undertaking on the part of the appellee that the contract of Gillispie was what it purported to be, a contract by a party who was competent to enter into and bind himself by such contract. In this it appears he was mistaken. Gillispie has succeeded, by the decree of the court, in vacating and annulling the contract, upon the ground of infancy; and the appellant thereby loses the life interest of said Gillispie in the subject for which he contracted to pay the appellee the sum of three hundred dollars. For this cause he would have been entitled to call for a rescission of the contract. But instead of resorting to this course, he re-

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sisted all efforts of the appellee to procure a rescission; and he did this with full knowledge of the pretensions of Gillispie. He purchased from the appellee on the 31st of July 1832. The bill of Gillispie was filed on the 3d of June 1833. He was then apprised of the difficulty as to this interest. He had then paid no part of the purchase money. Instead of abandoning his claim, he insisted in his answer upon the validity of the transfer in the first instance, or that, from long acquiescence, it could not be then impeached; but, in the event of his being mistaken in these views, he claimed the right to recover from Gillispie the consideration paid to him for the sale of his interest by the said John James.

In a short time after the institution of the said suit by Gillispie, the appellee filed his bill, mainly for the purpose of rescinding the contract; but this was resisted by the appellant; and when, in February 1847, the cause was heard, the court, by its interlocutory decree, gave the appellant the election to rescind the contract or to pay the purchase money. In this case no fraud is imputed to the appellee. It is nowhere pretended that he knew Gillispie was an infant in 1803, when he sold to the appellee, or when the latter transferred this interest to the appellant in 1832. On the contrary, he had a right, from the long silence of Gillispie, to presume that the transfer was valid. But the mutual error of the parties, in the substance of the thing contracted for, was a good ground for rescinding the contract; and if the appellant had sought such rescission when the knowledge of the mistake was first acquired, or consented to it when the appellee filed his bill for that purpose so soon after the sale, the parties could have been placed *in statu quo*, without injury to either, so far as the record discloses. But he resisted a rescission, and even so late as 1847; and when the election was tendered to him he still

declined it: He cannot now be permitted to claim a partial rescission.

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The contract was entire; an agreement to pay a gross sum for the interests transferred; and he has no right to rescind one-third of the contract, and enforce the residue. *Glassell v. Thomas*, 3 Leigh 113. There is no middle ground here between a rescission *in toto* and an execution *in toto*. But the record shows a sufficient motive for his not desiring a rescission. In the suit of Gillispie he claimed to be substituted to the rights of the appellee, and, as such, entitled to a decree against Gillispie for the price paid to him by the appellee for his interest in the land; and the court, upon vacating Gillispie's release, decreed he should refund the consideration with interest, subject to a deduction for rents and profits. The consideration, with interest from 1803, would, in all probability, have much exceeded the value of Gillispie's life estate in the subject. The appellant may have rested satisfied that the existence of this claim would either induce Gillispie to forego the assertion of his right to the subject, or would more than indemnify him for the price he agreed to pay to the appellee for this particular interest. In truth, it would seem from the record that the appellant was rather disposed to raise up objections to his own title, so long as they would avail him to resist the claim of his vendor for payment. It does not appear that he instituted any proceedings to set aside Spencer's decree; and it was not until the dismissal of the bill filed by Spencer's administrators that said decree was ascertained to be inoperative. He took no steps to procure a legal title from Spencer's heirs. He refused to rescind, though apprised at an early day of the mistake as to Gillispie's interest. He has availed himself of his right, as representing his vendor, to repel the claim of Gillispie until he shall refund the price he received from John James,

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with the long arrears of interest. In the mean time he has held all he contracted for, and enjoyed the profits. I think the court properly required him to pay the purchase money when he declined to rescind the contract.

It is further argued, that the court erred in giving interest on the three hundred dollars from the date of the contract; that it was not payable but upon a contingency which has never happened. The contract recites that it was in consideration of three hundred dollars in hand paid; and the bond was payable presently, though a condition was attached, in the nature of a defeasance, upon a certain contingency. The appellee bound himself, by the contract of sale, to give immediate possession; and the appellant, by his answer, admits that he was in possession. He has enjoyed the profits, and in equity should pay interest on the price contracted to be paid: and that, it seems to me, is the effect of the bond and agreement. The latter shows a cash sale, and the bond admits an existing debt due presently, but liable to be defeated in the event of his failure to set aside the decree or get a title. It seems to me that interest was properly allowed from the date of the contract.

I am for affirming the decree.

MONCURE and LEE, *Js.* concurred in the opinion of *Allen, J.*

SAMUELS, *J.* dissented.

DECREE AFFIRMED.

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August 22d.

1. A certificate of the secretary of state of Ohio, under the great seal of the state, that the statute certified is correctly copied from the original rolls now on file in this (his) office, is a due authentication of the statute, according to the act of congress.*
2. A note made, in a particular country is to be deemed a note governed by the laws of that country, whether it is made payable there, or it is payable generally, without naming any particular place.
3. The possession of a negotiable instrument is *prima facie* evidence that the holder took it for value, and that he came to it honestly.
4. A total failure of the consideration of a negotiable note does not impose on the innocent holder the *onus* of proving that he gave value for it.
5. If the evidence raises a suspicion of fraud in the procurement of the note, then the holder is bound to show that he gave value for it.
6. Bill by maker of a negotiable note against payee, endorser and holder for value, to enjoin its payment on the ground of failure of consideration. As between the maker, payee and endorser, it appears the consideration of the note had wholly failed, and that the payee had endorsed it, without consideration, as a gift to the endorser. Though the maker is bound to pay the note to the holder, he is entitled to recover the amount so paid from the payee; or, upon his inability to pay, to recover of the endorser the amount received by him for the note.

In June 1848 Noah L. Wilson filed his bill in the Circuit court of Wood county, in which he alleged that on the 26th of September 1837 Enoch Rector, of that county, sold and conveyed, with general warranty, to the plaintiff and John Mills one undivided fourth of certain lands and lots in the county of Washington, in the state of Ohio; and that for one moiety of the pur-

* See Judge *Daniel's* opinion for the act of congress, 2 Story's *Laws U. S.*, p. 947-48.

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chase money, amounting to two thousand one hundred and eighty-seven dollars and fifty cents, the plaintiff executed to Rector his note, bearing date the 1st day of January 1838, payable ten years thereafter, and bearing three *per centum per annum* interest. That shortly afterwards Rector, without any consideration, but intending it as a gift, assigned the said note to certain persons, trustees of Rector College, an institution located in Taylor county, in Virginia, all the parties to this assignment then living in this state, and the same having been made here; and that these trustees had since assigned the note to William Lazier.

The bill further charged, that previous to the conveyance to the plaintiff and Mills, Rector had mortgaged the property to the Ohio Life and Trust Company; and in a suit by that company in the state of Ohio, to foreclose the mortgage, all the property had been decreed to be sold, and part of it had been sold under the decree, and the whole of it would be required to be sold to satisfy the mortgage debt; so that the consideration of the note had wholly failed. And it was further alleged that Rector was insolvent.

The bill made Rector, Lazier and the trustees of Rector College defendants; called upon them to state the consideration Rector had received for the assignment of the note, and what was the consideration which the plaintiff had received for it. And the prayer of the bill was that the contract for the sale of the land might be rescinded; that the note might be delivered up to be canceled; and for general relief.

Lazier answered the bill. He stated that he purchased the note of Wright and Baldwin for a full, valuable consideration: That they were house carpenters, and had built Rector College, and received the note, in part payment of their bill, from the trustees. That he had afterwards endorsed it, and passed it off; but, when it became due, he had been sued upon it,

and had paid it with the interest and costs. That he had no knowledge whatever of the transactions between Wilson and Rector and Rector and the trustees of the college. That he was a purchaser for value, without notice of any equity, want of consideration, or any other fact or circumstance connected with said note, until some time after he had purchased it. And he alleged that the note was made and delivered to Rector in Ohio; and that by the laws of Ohio it was a negotiable instrument, and to be governed by the law merchant.

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Rector also answered, and alleged that the note was given upon a compromise between himself and the plaintiff and Mills, with a full knowledge, on their part, of the existence of the mortgage on the property. He states that he never received any value for the note. The bill was taken for confessed as to the trustees of Rector College.

There was no evidence but the answer of Rector, that the consideration of the note was the land in Ohio. If that was the consideration, it had wholly failed. The note was dated at Marietta, in Ohio, and was payable generally to the order of Rector; and Wilson, the maker, lived at the time, and continued to live, in Marietta. It did not appear, except from the answer of Rector, upon what terms he assigned it to the trustees of Rector College.

It was also shown that Wright and Baldwin built the college, and the note was assigned to them by the trustees, by endorsement on the back thereof. It was proved that they stated they had sold the note to Lazier; and there was in the record a deed by which the trustees conveyed the college property in trust, that if Lazier failed, upon the use of due diligence, to recover the amount of the note from Wilson or Rector, the property should be sold, and Lazier should be paid the sum of one thousand three hundred dollars, with six

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per centum interest thereon from the 30th of September 1839 until paid ; that being the amount they had received for the note. These statements of Wright and Baldwin, and the deed from the trustees, were accepted to by the plaintiff as incompetent evidence.

There was also in the record the copy of an act of the legislature of the state of Ohio, by which all notes for a sum certain, and payable to order, were made negotiable. The first section will be found in the opinion of Judge *Daniel*. The copy of the act was certified by the secretary of state of Ohio, under the great seal of the state, as being correctly copied from the original rolls then on file in his office.

When the cause came on to be heard the court dismissed the bill as to all the parties but Rector, and gave the plaintiff a decree against him for the amount of the note, with three *per cent. per annum* interest. And thereupon Wilson applied to this court for an appeal, which was allowed.

Price, for the appellant.

Grattan, for the appellee, Lazier.

DANIEL, *J.* I do not perceive any ground for the objection made to the authentication of the copies of the statutes of the state of Ohio, filed by the appellee, Lazier. The act of congress, approved March 27, 1804, declares that all records and exemplifications of office books, which may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of said records or books, and the seal of his office thereto annexed, if there be a seal ; together with a certificate of the presiding justice of the county or district in which such office may be kept, or of the governor, *the secretary of state*, the chancellor, or the keeper of

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the great seal of the state, that the said attestation is in due form, and by the proper officer. And if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. Story's Laws of the U. S., vol. 2, 947-8. And we have the certificate of the secretary of state of the state of Ohio, under the great seal of the state, stating that the said acts "are correctly copied from the original rolls now on file in this (his) office."

From this certificate it appears that the secretary of state is himself also the keeper of the rolls. If the offices had been separate, his certificate of the attestation of the keeper of the rolls would, plainly, under the provisions of the law, have been sufficient, without any additional certificate by the governor. I do not see how the fact that he happens to hold both offices detracts at all from the efficacy of his certificate as secretary of state.

By the first section of the first of the above mentioned acts, all bonds, promissory notes, bills of exchange, foreign or inland, drawn for any sum or sums of money certain, and made payable to any person, or order, &c., are placed on the footing of negotiable paper. The note for two thousand one hundred and eighty-seven dollars and fifty cents is dated "Marietta." In the deed from Rector to Mills and Wilson, of the 29th of September 1837, the two latter are described as of Marietta, Washington county, Ohio. And the witness Murdock in his deposition states that he has been acquainted with Wilson for some ten years, and during that time had always understood that his residence was in the town of Marietta, in the state of Ohio. The evidence is, therefore, I think, ample to show that the note was executed in Ohio;

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and by the laws of that state, as we have seen, it stands on the footing of a negotiable instrument.

Such being the *lex loci contractus*, the note must be treated as negotiable paper here: For it seems to be well settled that a negotiable note, made in a particular country, is to be deemed a note governed by the law of that country, whether it is expressly made payable there or is payable generally, without naming any particular place; since at most, under the latter circumstances, it is as much payable in that country as elsewhere. Hence such a note makes *the maker* liable only according to the law of the country where the note is executed, although endorsed in another country; and his liabilities, and so also his rights; as for example, the right to set up equitable defences against the note, if allowed by the country where the note is executed, are regulated by the law of the same country. Story on Promissory Notes, § 172.

Lazier must be presumed to be *prima facie* a holder for value. Story on Promissory Notes, § 196. "The owner of a bill is entitled to recover upon it, if he came to it honestly; that fact is implied, *prima facie*, by possession; and to meet the inference so raised, fraud, felony, or some such master, must be proved." Extract from the opinion of Lord Denman in *Arbouin v. Anderson*, 1 Ad. & Ellis N. R. 498, 504, 41 Eng. C. L. R. 642, cited in note to foregoing section. *Vathir v. Zane*, 6 Gratt. 266, opinion of Allen, J. Upon the supposition, however, that the establishment of want or failure of the consideration would make it incumbent upon the holder to show that he had given value for the note, no such matter is established here as against Lazier. In his answer he denies all knowledge whatever of the transactions between Wilson and Réctor. He avers that he is an innocent purchaser for a full, fair and valuable consideration, without any notice whatever of any equity, want of con-

sideration, or any other fact or circumstance connected with the note, until some time after he had purchased. The statements in the bill, and the admissions in the answer of Rector as to the contract on which the note was founded, furnish no proof against Lazier. As to him there seems to be the entire absence of any competent evidence to show what was the origin of the note.

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Even, however, if there were evidence competent and plenary, as against Lazier, to show a failure of the consideration of the note, I should still hold that he was not bound to prove that he paid value for it. There is no evidence of fraud in the origin or negotiation of the note; and the mere failure of consideration does not impose on the innocent holder the *onus* of showing the consideration he gave for the note. In a note to Chitty on Bills, 10th American edition, p. 648, we have a report of the case of *Whitaker v. Edmunds*, 1 Mood. & Rob. 366. In that case Patterson, judge, said: "Since the decision of *Heath v. Sansom*, 2 Bar. & Adol. 291, 22 Eng. C. L. R. 78, the consideration of the judges has been a good deal called to the subject; and the prevalent opinion among them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it. So far, I accede to the case of *Heath v. Sansom*, for there were in that case circumstances raising a suspicion of fraud; but if I added on that occasion, that even *independently* of those circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as between the

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previous parties to the bill, *I am now decidedly of opinion that such doctrine was incorrect.*"

And in *Knight v. Pugh*, 4 Watts & Sergeant 445, the authorities are fully examined and reviewed, and the rule stated to be, that in a suit against the maker, by an endorsee, the plaintiff cannot be called upon to prove that he paid value for the note, until the defendant has shown it was obtained or put in circulation by fraud or undue means. In the opinion of Sergeant, judge, it is conceded that the rule at one time obtained of allowing the defendant, on proving that he received no consideration, to call upon the plaintiff to show the consideration he gave for the note; but he proceeds to show that the latest authorities exclude want of consideration in the note, or subsequent failure, from the class of cases in which the defendant may call on the plaintiff to prove the consideration he paid. See *Low v. Chifney*, 27 Eng. C. L. R. 383.

There is nothing in *Vathir v. Zane*, 6 Gratt. 246, decided by the court, or intimated by any of the judges, in conflict with these authorities. The proposition there decided is, that when fraud in the procurement of the note is averred and proved, the maker has brought himself within the exception to the general rule; that the *onus probandi* is then shifted, and thrown on the holder to show he has paid value.

In this view of the law the exclusion of the declarations of Wright and Baldwin, in reference to the transfer of the note, could not affect the case, so far as Lazier is concerned, no ground being laid for requiring him to prove what consideration he paid for the note. The court below has therefore, I think, very properly refused any relief against the note in the hands of Lazier.

As between the maker and the payee of the note, however, the want of consideration or subsequent

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failure is a proper defence, and the equities between them are not lost or destroyed by the transfer of the note: As between Wilson and Rector, the testimony is ample to show that there has been an entire failure of the consideration for which the note was given, the whole of the land, in payment of the purchase money of which it was executed, having been absorbed by a paramount incumbrance.

In this state of things the principles decided in the cases of *Dade's adm'r v. Madison*, 5 Leigh 401, and *Pettit v. Jennings*, 2 Rob. R. 676, would seem fully to sanction such a decree as has been rendered by the Circuit court in favor of Wilson against Rector. In the first mentioned case an order was drawn by Dade on Madison in favor of Tankersly, and accepted by Madison. Tankersly having obtained a judgment at law on the order against Madison, the latter enjoined the judgment, on the ground that the order and acceptance were founded on a gaming consideration. Dade, in his answer, admitted that the order was drawn by him for money which he had won of Madison at cards; and he said that Tankersly was apprised of the consideration and took the order at his own risk. Tankersly denied all knowledge of the transactions between Dade and Madison, in consideration of which the order was drawn; averred that he had given Dade an adequate valuable consideration for it; and that Madison accepted it without hesitation or objection, and had obtained indulgence from time to time, on promise of payment. There was no evidence as between Madison and Tankersly to establish that the order was founded on a gaming consideration, unless the answer of Dade could be used against Tankersly.

This court held that the answer of Dade was no evidence against Tankersly; and there being a failure to show, by any testimony competent, as against him,

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that there was any vice in the consideration of the order, Tankersly was permitted to execute his judgment against Madison. But the court also held that the Circuit court had properly rendered a decree over in favor of Madison against Dade, of which Madison should be permitted to avail himself as soon as he satisfied the judgment in favor of Tankersly.

In the second case, (*Pettit v. Jennings*.) the same principles were reaffirmed. In an injunction suit by the obligor in a gaming security against the obligee and an assignee, the gaming consideration was admitted by the obligee in his answer, but there was no competent proof against the assignee. The assignee was permitted to recover, but the obligor was indemnified by a decree over against the obligee. The grounds for such relief are forcibly stated by Judge Baldwin in his opinion: "When a failure of proof (he says) as to the assignee, on a supervening equity between him and the obligor, induces a court of equity to enforce the security in behalf of the assignee, or, what is in effect the same, to suffer it to be enforced, then the court ought to proceed, if the subject and parties be properly before it, to administer the justice of the case as between the obligor and the obligee. The latter having by his contract of assignment appropriated to himself the avails of the security, and being enabled to retain them by the act of the court, which relieves him incidentally from all responsibility to his assignee, the result is, when the security shall have been enforced against the obligor, that the obligee has obtained from him in substance, though not in form, by means of a compulsory proceeding, satisfaction of a debt destitute of consideration, and denounced by the law: but the subject and the parties are still before the court, and I am at a loss to conceive upon what principle the court can refuse

redress to the obligor against the obligee." So here, the whole foundation on which the note rested having been swept away by an entire failure of the consideration, it was a worthless paper, and liable to be canceled so long as it remained in the hands of Rector. By means of *his* transfer, and of the transfers of *others* claiming under him, the note has reached the hands of one who, from considerations of commercial policy favoring the negotiability and circulation of such instruments, is allowed, under the circumstances, to enforce it against the maker as a valid security. But Rector has thereby acquired no advantage which can avail him in a court of equity. Having voluntarily placed it out of his power to cancel the note, he is bound, in equity and good conscience, to place Wilson, as nearly as may be, in the position he occupied before the note was endorsed away. The measure of the indemnity is the amount that Wilson is bound to pay to Lazier, viz : the principal and interest of the note.

The decree in favor of Wilson against Rector is, therefore, I think, clearly right ; but the court has, it seems to me, stopped short of giving to Wilson the whole relief to which he is entitled. It is alleged in the bill that Rector assigned or endorsed the note to the trustees of Rector College, without consideration ; that he made a donation of said note to the college ; and that the said trustees had transferred the note to Lazier. They have not answered, and the bill as to them has been taken as confessed ; and from the deed executed by the trustees on the 11th November 1839, styling themselves Trustees of the Western Virginia Education Society, it is recited that Rector transferred the note to the said trustees, and that they, for the purpose of raising funds to erect the necessary buildings of said society, *sold* and transferred the said note

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to James D. Wright and David Baldwin, and that Wright and Baldwin subsequently *sold* and transferred it to Lazier: And the said deed conveys property for the purpose of indemnifying and securing Lazier, in the event that he should fail, after using due diligence, to recover the debt from Wilson and Rector.

The want or failure of consideration in the note may be insisted upon as a defence, not only between the original parties to the contract, but also between the maker and one who claims under the payee without having given value for the note. Story on Promissory Notes, § 190. If the note were now in the possession of the society, they would have nothing to plead against its cancellation. The presumption which has stood to Lazier in the place of proof, and protected him as a *bona fide* holder for value, cannot be invoked by the society. They have not denied the positive allegation of the bill, that they acquired the note by donation. They have, by their own admission, sold and transferred the note, and have placed their endorsee in a position to enforce it. If permitted to retain the purchase money of the note to the prejudice of Wilson, they will, in substance and effect, have coerced him to pay to them the amount of a note against which, as between him and them, he had a valid defence. They may have parted with the note, and most probably did part with it, without any knowledge of the defect or failure in the consideration. But they gave nothing for the note, and to the extent that they have received value for it they are in the receipt of money which they had no right, in equity, to collect. They are holding funds to which another *in foro conscientie* has a better right. Rector is alleged and proved to be insolvent. The decree over against him will, therefore, in all probability, prove unavailing. In such an event, I do not perceive upon

what grounds of equity his voluntary donee can claim to hold the funds which have been realized, in effect, by the collection of an instrument wholly void of consideration.

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It seems to me that the society, in such a state of things, is bound to hand over to Wilson whatever they may have received as the price of the transfer of the note.

Upon the whole, I think the decree is right in all things except in dismissing the bill as to the Western Virginia Education Society. I am, therefore, for affirming the decree, so far as it refuses to relieve Wilson against the note in the hands of Lazier, and gives him a decree over against Rector; but for reversing, so far as it dismisses the bill against the society, and for remanding the cause for further proceedings, with liberty to Wilson, on paying the amount of the note and interest to Lazier, and on showing that the decree against Rector has proved unavailing, to apply for and have a decree against the society for the amount that they received as the price of the note, with its interest.

The other judges concurred in the opinion of *Daniel, J.*

The decree was as follows :

The court is of the opinion that the appellee Lazier ought to be regarded as the *bona fide* endorsee for value of the note for two thousand one hundred and eighty-seven dollars and fifty cents, in the bill and proceedings mentioned, without notice of the failure of the consideration for which it was given, and that the said note, as between the said Lazier and the maker, the appellant Wilson, is a valid instrument, liable to be enforced against the said Wilson.

The court is further of opinion, that the testimony

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in the cause is competent and plenary to show, as between the said Wilson and the appellee Rector, that the consideration of the said note has entirely failed; and that if Rector still held it, it would be liable to be canceled at the suit of the said Wilson.

The court is further of opinion, that as the said Rector has endorsed the note and placed it in the power of his remote endorsee, the said Lazier, to enforce it as a valid instrument against the said Wilson, he is bound in equity to indemnify the latter by paying to him the principal and interest of the said note, whenever he (the said Wilson) shall have paid the same to the said Lazier.

The court is further of opinion, that as the trustees of Rector College obtained the said note from the said Rector, without having paid value therefor, and by way of donation from the said Rector, and have endorsed the same for a valuable consideration, and have, by means of the said endorsement and of the subsequent endorsement of their endorsees, Wright and Baldwin, enabled Lazier to enforce the note against the said Wilson, the said Wilson has a right in equity, on showing that he has paid the same, and that he is unable to obtain the indemnity against the said Rector to which he is entitled, by reason of the insolvency of the latter, to recover of the said trustees of Rector College the price of their transfer of said note, with its interest.

The court is therefore of opinion to affirm the whole of the decree, except so much thereof as dismisses the bill against the said college, with costs to the said Lazier; and to reverse so much as dismisses the bill against the said college, with costs to the plaintiff in error against said college; and to remand the cause for further proceedings, with liberty to the said Wilson, on showing that he has paid the principal

and interest of the said note to the said Lazier, and that the decree in his favor against Rector has proved unavailing, to ask for and have a decree against the said trustees of Rector College for so much as they received from their endorsees Wright and Baldwin, as the price of their endorsement of said note to the latter.

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Upon the application of the said Wilson to have the decree aforesaid, the trustees of the college may, if they can, show that they received less for their transfer than the nominal value of the said note; and in such event, the decree will be for such smaller sum, with its interest. But in case they fail to furnish such proof, the decree must be for such nominal value, and its interest.

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1. Real estate is conveyed in trust to secure debts. The grantor in the deed has at the time but an equitable title, but is entitled to have the legal title. It is an abuse of his power by the trustee to sell the property before getting the legal title.
2. The trustee having sold the property for one-fourth of its value, without getting the legal title, and the principal creditor secured by the deed having become the purchaser; and the grantor being absent at the time, and the money to pay the debts having been forwarded to his agent at the place of sale, and being at the time in the post-office at the place and not delivered to the agent, though in the expectation of receiving it he had several times applied at the office for the letter, a court of equity will set aside the sale.

Rossett, by deed of trust dated the 12th of April 1844, conveyed certain real estate, consisting of a lot of ground with a brick house thereon, in the town of Ripley, in the county of Jackson, to Joseph Smith, in trust to secure the payment of two single bills, one to Andrew Wilson & Co., for forty-three dollars and seventy cents, dated the same day with the deed, and payable one year thereafter, with interest from the date, and the other to Henry J. Fisher, for one hundred and fifty-two dollars, dated the 2d of January 1844, and to indemnify Fisher as security for costs in the case of *Hassler's lessee, &c., v. King*. The deed provided that in case of default in the payment of the said debts and exoneration of said security in one year from the date of the deed, the trustee should sell the property for ready money, at public auction, before the front door of the court-house of Jackson county, and apply the proceeds to the satisfaction of the purposes of the trust. Rossett having made default, the

trustee, at the request of Fisher, after giving thirty days' notice of the time, place and terms of sale, by causing an advertisement thereof to be posted at the door of the said court-house, did, on the 23d of June 1845, (that being the first day of a quarterly term of said county,) at the door of the said court-house, expose the said property to public sale for ready money, when the said Fisher, being the highest bidder, became the purchaser, at the price of two hundred dollars. And the property was accordingly conveyed to him by the trustee, who received the purchase money, and applied it to the purposes of the trust, and made a report of the sale according to law.

In July 1847 Rossett filed his bill in the Circuit court of said county, for the purpose of setting aside the said sale; stating in the said bill that for a short time previous to the expiration of the trust he had been in Pennsylvania for the purpose of raising money to discharge the debts secured by the deed, having left D. G. Morrill, of Ripley, as agent to attend to his business. That shortly before the expiration of the trust he forwarded, or caused to be forwarded, to his said agent, through the medium of the mail, a draft from the treasury department at Washington, on the Commercial Bank of New York, for the sum of two hundred and twenty dollars, with directions to be applied towards the liquidation of the said debts; that the draft arrived at the post-office in Ripley two days before the day advertised for the sale of the property, but from some cause, either accidental or designed, the post-master neglected to hand the letter containing the draft to the said agent, although repeated applications were made therefor, until two days after the sale, when the agent received the draft and tendered it to Fisher, who refused to receive it. That when the property was exposed to sale Fisher bid two hundred dollars for it, and directed the sale to be suspended for the time

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then present; that late in the afternoon, near sundown, of the same day, when there were no bidders present, as complainant was advised, but the said Fisher, the sale was resumed, and no further bid being made, the property was cried out to Fisher at his said bid of two hundred dollars; the complainant's said agent being present and forbidding the sale. That the sum of two hundred dollars was a greatly inadequate price for the property, which was worth one thousand two hundred dollars, and complainant believed would have sold for the same, if it had not been represented to some who were anxious to purchase that the sale would be postponed; and that Fisher had frequently, after the execution of the deed of trust and before the sale, made different offers for the property, greatly exceeding the price at which he purchased it, but complainant rejected them as inadequate. Other statements are contained in the bill, but it is unnecessary to notice them. Fisher, Smith the trustee, and Wilson & Co. were made defendants.

In August 1847 Fisher filed his answer, denying many, if not most, of the material allegations of the bill. He denies that the property (the imperfect and dilapidated condition of which he minutely describes) could under any circumstances have been sold for as much as one thousand two hundred dollars, and attributes the sacrifice (if any) at which it was sold to the fact that the sale was forbid by Rossett's agent, and also to the condition of the title at the time of the sale. In regard to the latter, he states that Rossett had no deed for the property, and only incumbered his equitable right thereto, the legal title being in A. N. Kinnaird, of Wood county, whose wife had and still has a claim of dower therein; "that it was very uncertain whether Kinnaird would make the deed or not; for, if there is not now, there formerly was, a suit depending on the equity side of Jackson county Superior

court, brought by respondent for Rossett against Kinnaird, to compel him to make this very deed, which suit, or another similar one, had to be brought at the sale under the trust; all of which was well known to respondent, and it is believed also to most, if not all, of the capitalists present at the sale; and it is believed most of the capitalists of Jackson county were present." He further states that after getting the trustee's deed, he turned his attention to getting in the legal title outstanding in Kinnaird; and on the 1st day of August 1845 drew a deed, which was by him executed and acknowledged on the 4th day of September 1845, and came to respondent's hands some months thereafter, when it was placed on record. A copy of this deed is filed with the answer.

In October and November 1847 Wilson & Co. and the trustee Smith filed their respective answers. That of the former it is unnecessary to notice. The latter states in his answer that there was a large crowd at the sale; that at its commencement, between 10 and 11 o'clock, D. G. Morrill, representing himself to be Rossett's agent, forbade the sale, which was disregarded, and the sale went on; that after getting two or three, or perhaps more bids, respondent suspended the sale until after dinner, when he recommenced it, and, there being no other bid, was about to close the sale, when Morrill requested him to leave it open as long as he could, representing that a few, perhaps two or three, days before Rossett had gone to Point Pleasant, and would very likely be back before sun-down, and perhaps be able to effect an arrangement and obviate the sale; that with Fisher's consent the sale was suspended until near sun-down; that shortly before the sale was closed respondent went to several who had during the day bid, or talked of bidding, and let them know that the sale would shortly be closed at the court-house door, and at more than one place

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gave public notice that the property would there be cried for the last time: and after crying it thirty or forty minutes at the court-house door, without receiving another bid, he cried it out to Fisher, who requested respondent not to make a deed for the property until he should see respondent again. That in fact the deed was not made until the date of the acknowledgment, (which is the 30th of July 1845,) though it bears date on the day of sale. That it was not true that any person was prevented from bidding at the sale in consequence of the time it was closed. That he knows of no representation having been made to any person anxious to purchase, that the sale would be postponed, and if he had known of any such representation he would at once have undeceived the person to whom it was made; and that he would not, acting as trustee, (and knowing his duty to be to act as the agent of both parties,) have sold property under such circumstances as are alleged in the bill.

Sundry depositions were taken in the case; and among them the depositions of Smith the trustee, Morrill the agent of Rossett, Wetzel the deputy post-master at Ripley, and Hassler. Smith proved substantially the same facts stated in his answer. Morrill proved that he was Rossett's agent in Jackson, at and before the time of the sale, informed Rossett, who was absent, that the property would probably be sold under the deed of trust, and furnished him with a statement of the probable amount necessary to discharge the deed. Rossett replied that he would make arrangement with Hassler to have the requisite amount forwarded for that purpose. Previous to the sale deponent had frequently called at the post-office at Ripley and enquired for a letter in which he expected a draft to discharge the deed of trust, and was as often informed by the post-master that there was no such letter. When the trustee was about to proceed to

make the sale, deponent, as the agent of Rossett, forbade it, stating that he had received the most positive assurance that an arrangement would be made to pay the money, and that he expected Rossett (who had been a few days before in Ripley, and had gone to Point Pleasant to see if the draft had not been sent to that place) to arrive every hour. Deponent's statement of what followed the sale substantially agrees, as far as it goes, with that of the trustee. On the 27th of June, four days after the sale, deponent received the draft, which he had no doubt was in the office at the time of the sale. He afterwards called on Fisher and asked him if he would receive the draft in discharge of the deed, which he refused to do. Deponent's impression was that in the letter conveying the draft Hassler required that Fisher, on receiving the draft, should have the trust deed assigned to him. Wetzel's deposition confirms that of Morrill in regard to his repeated enquiries for letters, and his belief that the letter enclosing the draft was in the post-office at the time of the sale and when the enquiries were made; but it was overlooked, being, as deponent thought, in a wrong box. Hassler proved that early in the spring of 1845 Rossett applied to him for two hundred and twenty dollars to pay to Fisher for the redemption of his property in Ripley. Deponent would have advanced the money immediately to Rossett, but he preferred a check for the amount to be forwarded to Morrill; and deponent accordingly enclosed a government check on the Commercial Bank of New York for the amount, and mailed the letter on the 12th of June 1845. Such checks he was in the habit of disposing of for a premium in gold. A letter from Rossett to Fisher, dated the 9th of June 1845, and directed to Point Pleasant, stating the arrangement made with Hassler, was received by Fisher on the 18th of June 1845, and was filed as an exhibit by him.

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From that letter it appears that Rossett expected the check to be sent to Fisher at Point Pleasant, the place of his residence, about thirty miles distant from Ripley : But it was sent to Morrill at Ripley.

The evidence of the value of the property at the time of the sale is somewhat complicated and conflicting. A great deal of evidence was taken by Fisher to show the bad construction and dilapidated condition of the building ; but none of it, I believe, fixes the value *in numero* at that time. A letter from Fisher to Rossett, dated May 29th 1844, between one and two months after the date of the deed of trust, is exhibited with the bill. In that letter the writer manifested a strong desire to purchase the property, and complained that Rossett had asked him one thousand dollars for it, while, as the writer had been informed, Rossett had offered to sell it for six hundred dollars. The fair inference to be drawn from this letter is, that when it was written Fisher would have given at least six hundred dollars for the property. But I think the best evidence of the value of the property at the time of the sale is to be found in the deposition of William Shepard, high sheriff of Jackson, who proved that in his opinion the property was then worth at least eight hundred and fifty or nine hundred dollars.

On the 19th of September 1848 the cause came on for final hearing, and the bill was dismissed. From that decree Rossett has appealed.

Price, for the appellant, and *Patton*, for the appellees, submitted the case.

MONCURE, *J.*, after stating the case, proceeded :

A trustee in a deed of trust is the agent of both parties, and bound to act impartially between them ; nor ought he to permit the urgency of the creditors to force the sale under circumstances injurious to the

debtor at an inadequate price. 1 Lom. Dig. 323; *Quarles v. Lacy*, 4 Munf. 251. He is "bound to bring the estate to the hammer," as has been said by Lord Eldon, "under every possible advantage to his *cestui que trust*"; and he should use all reasonable diligence to obtain the best price. Hill on Trustees 479, marg. and the cases cited. He may and ought, of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust; to remove any cloud hanging over the title; and to adjust accounts if necessary, in order to ascertain the actual debt which ought to be raised by the sale, or the amount of prior incumbrances. And he will be justified in delaying, for these preliminary purposes, the sale of the property, until such resort may be had to a court of equity. If he should fail, however, to do this, the party injured by his default has an unquestionable right to do it; whether such party be the creditor secured by the deed, or a subsequent incumbrancer, or the debtor himself or his assigns. And this may be done notwithstanding the impediments in the way of a fair sale may have been known to the debtor at the time of the execution of the deed, and the removal of them before the time prescribed in the deed for the sale was impracticable, and could not therefore have been contemplated by him.

For these principles I refer to 1 Lom. Dig. 322-326; 1 Tuck. Com., book 2, p. 101-106; *Quarles v. Lacy*, 4 Munf. 251; *Gay v. Hancock*, 1 Rand. 72; *Chowning v. Cox*, Id. 306; *Gibson's heirs v. Jones*, 5 Leigh 370; *Miller v. Argyle's ex'or*, Id. 460; *Wilkins v. Gordon*, 11 Leigh 547.

Let us apply these principles to this case. The property was sold for less than a fourth of its value. The sale was made under circumstances and in a manner well calculated to produce such a result. Even if the title had been unexceptionable, I think the trustee

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ought to have postponed the sale to another day; which would have subjected the creditors to no other inconvenience than a little delay, while it would have avoided a sacrifice, and might have obviated the necessity of a sale. It may be said that Rossett's agent ought not to have forbid the sale. Whether he ought or not, he did what he thought was his duty, and I do not think that this act of the agent justified the sacrifice of the principal's property. See *Ord v. Noel*, 6 Madd. R. 126; *Wilkins v. Gordon*, 11 Leigh 547.

But in my view of this case it is unnecessary to consider whether the sacrifice of the property, and the circumstances under which it was sold, independently of the state of the title, would, severally or together, be sufficient ground for setting aside the sale. I am of opinion that the cloud over the title at the time of the sale is of itself a sufficient ground for that purpose. The deed conveyed, and the trustee sold, only the equitable title to the property. The legal title was outstanding in A. N. Kinnaid. It should have been gotten in before the sale; and the trustee would have been justified in delaying the sale, and in bringing a suit, if necessary, for that purpose. No efforts were used to get it in. It probably might have been gotten in without a suit, and merely by calling on Kinnaid and presenting him a deed for execution. The deed of trust recited that Rossett had paid Kinnaid for the property. Fisher obtained a deed from Kinnaid shortly after the sale, and seems to have had no difficulty in obtaining it. That this defect was a cloud over the title, which it was the duty of the trustee to have had removed before the sale, and that on his failing to do so the debtor had a right to have the sale enjoined until the cloud was removed, are propositions which are fully established by the authorities before referred to. The existence of the defect appeared upon the face of the deed of trust, and was

well calculated to affect the sale. Indeed, Fisher states in his answer that it was well known to him, and most if not all the capitalists present at the sale, that the legal title was in Kinnaird; that it was very uncertain whether he would make a deed for it or not; and that a suit would probably be necessary to compel him to do so: And this is stated in the answer as one of the causes of the sacrifice in the sale of the property. But the trustee having made the sale without having the cloud over the title removed, and the principal creditor secured by the deed having become the purchaser, the question is, whether the debtor is entitled to have the sale set aside? He had provided funds for the payment of the trust debts, and expected in that way to prevent a sale; but was disappointed by an unforeseen and unaccountable accident. But for having made such provision he might have resorted to an injunction. He was not present at the sale, forbade it by his agent, and has never acquiesced in it. The purchaser was the principal creditor, was well acquainted with all the facts which rendered the sale improper, and yet insisted on its being made. A few days after the sale, and before a deed was made to him by the trustee, the draft for two hundred and twenty dollars, which exceeded the amount of the trust debts, was offered him by the debtor's agent, but he refused to receive it, or give up the benefit of his purchase, and required the trustee to execute the deed; assigning as a reason therefor that the debtor had used abusive language to him. He says in his answer, that he believes when Rossett's agent first offered him the draft, he required an assignment of the deed of trust; though after the draft was refused on these terms, he perhaps offered it as a payment. All that Hassler could have expected was, to be substituted to the place of the creditors whose claims he was willing to pay; and not that they should incur any personal lia-

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bility as assignors to him, or that the operation of the deed as an indemnity to Fisher as security for costs in *Hassler's lessee, &c. v. King* should be impaired. It is obvious that Fisher did not refuse to give up the benefit of his purchase on account of the terms on which the draft was offered to him; though I do not consider that question material.

Whatever might have been the rights of a *bona fide* purchaser without notice at such a sale, as to which I express no opinion, I think that the creditor being the purchaser under the circumstances before stated, the debtor has lost none of his rights by the sale, but is entitled to have it set aside and the property resold, if necessary, for the purposes of the trust. See *Gibson's heirs v. Jones*, 5 Leigh, 370; *Breckenridge v. Auld*, 1 Rob. R. 148; *Dabney, &c. v. Green*, 4 Hen. & Munf. 101; *Lord Cranstown v. Johnston*, 3 Ves. jr. R. 170.

But it may be said that the cloud over the title is not mentioned in the bill as one of the causes of the sacrifice of the property; and therefore the sale should not be set aside on that ground. It is true that nothing is said about it in the bill; but it is fully stated in the answer, and is thus made a part of the case. A defect in a bill may be cured by a statement in the answer, where such statement, as in this case, is not inconsistent with the case made by the bill. An instance of this kind occurred in *Wood v. Dummer*, 3 Mason's R. 308. There the bill charged *fraud* as the ground for relief; whereas *trust* was the only ground on which it could be given; and to maintain that ground it was necessary to show that a certain corporation was insolvent. That fact was not charged in the bill, but was admitted in the answer; and thereupon relief was given. After the answer was filed in this case the appellant might have amended his bill and stated the fact in regard to the title. He actually did move at the hearing for leave to make such amend-

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ment, but it was denied by the court. If an amendment of the bill had been necessary, I think the court ought to have granted the leave, even at the late period at which it was asked. *Bellows v. Stone*, 14 New Hamp. R. 175. But I do not think it was necessary. It could have answered no good purpose, and would have been attended with expense and delay. There was much less reason for an amendment of the bill in this case than in *Shugart's adm'r v. Thompson's adm'r*, 10 Leigh 434, which was a suit to set aside a settled account. The answer denied the grounds on which the settlement was impeached in the bill. There was an order of account, and proofs were adduced which, though they did not sustain the specific objections taken in the bill, yet ascertained that the settlement might be justly surcharged in other respects. It was held, that although, according to the strictest and most formal practice, the plaintiff may be required to amend his bill, and urge therein the objections to the settlement shown by the evidence, yet it is competent to the court to dispense with this proceeding, and permit the plaintiff to proceed in respect to the objections shown by the evidence in like manner as if they had been noticed by the bill. Judge Stanard said: "Such a practice seems to me recommended by many considerations. It is more compendious and less expensive, and tends to prevent or shorten those delays in the administration of justice which are grievances admitted by all, and by many urged as a reproach to its ministers."

Upon the whole, I think the decree should be reversed, the sale set aside, the property reconveyed by Fisher, with covenants against his own acts only, to the appellee Smith, on the trusts declared by said deed of trust, and the said Fisher should account for the rents and profits of the property since the sale, after deducting the value of any permanent improvements made thereon by him, and also deducting any reason-

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able expense he may have incurred in getting in the legal title which was outstanding in Kinnaird at the time of the sale. And the cause should be remanded to the Circuit court for further proceedings to be had therein, as follows, to wit: An account should be taken of the said rents and profits, and of any such improvements and expense, for the purpose of ascertaining the balance due thereon by said Fisher; which balance should be applied to the purposes of said deed of trust, to wit, to the payment of the debts secured thereby, (both of which are now due to said Fisher, he having paid the debt to Wilson & Co. out of the price at which the land was sold to him at the trust sale,) with the interest which may be due thereon, and to the indemnity of the said Fisher as security for costs in the case of *Hassler's lessee, &c., v. King*. If the said balance should be sufficient to satisfy the said purposes, the surplus, if any, should be paid, and the property released, forthwith to the appellant. If there should be no such balance, or it should be insufficient to satisfy the said purposes, and the appellant, in a reasonable time to be prescribed by the court, should satisfy the same, or so much thereof as might remain unsatisfied by the application of any such balance as aforesaid, then the property should be released to the appellant. But if he should fail to make such satisfaction, then the said property should be sold in the manner and on the terms prescribed by the said deed of trust; and the proceeds applied to the satisfaction of the purposes of the trust, or so much thereof as might remain unsatisfied as aforesaid. The costs of the appellant in the Circuit court should be paid by the appellee Fisher.

The other judges concurred in the opinion of *Moncure, J.*

DECREE REVERSED.

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CAPERTON & al. v. GREGORY & als. lessee.

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(Absent Allen and Daniel, Js.)

August 22d.

J T died in 1823, leaving seven children, and seized in fee of a tract of land. S T, one of his sons, took possession of the land soon after his death, claiming that J T had made a will giving it to him for life, with remainder to his two sons; and he filed a bill against the other heirs to set up the will, which could not be found. This suit was pending until 1837, when it was dismissed for a failure to give security for costs. S T held the exclusive possession of the land during his life, and his two sons and those claiming under them continued to hold it until 1844, when the other heirs filed a bill for partition of the land; and in that suit the court directed that the plaintiffs should first establish their title at law. At the death of J T four of his heirs were married women, and three of them so continued; one of them died in 1832, leaving infant children and her husband surviving her; and he died in 1833. This suit was brought in 1848. **HELD:**

1. That S T having taken possession of the land in 1823, claiming title to it, and his sons having taken possession on his death, and they and those claiming under them having continued to hold the land, claiming title, such taking and holding possession was adverse to the other heirs, and the statute of limitations commenced to run from the time of such taking possession by S T.
2. That the pendency of the suit brought by S T to set up the will of J T did not prevent the running of the statute; that, having commenced to run, could not be stopped by anything occurring subsequently: And moreover, the will, as a will of lands, being valid without probat, and the suit being not to acquire title, but to establish evidence of title.
3. If in the suit for partition the heirs of J T had alleged and proved any equitable grounds to repel the statute, the chancery court might have given it effect by an order, when directing the suit to be brought for trial of title; but no such ground having been shown, and no such order made, the statute must have the operation which a common law court ascribes to it.
4. The statute runs against the *femes covert* and their husbands; so as to bar a recovery during the coverture.

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5. The infant children of the female heir, who died a *feme covert*, are barred after three years from the death of their mother, though they may continue infants all that time.*

This action was instituted in 1848. The case is stated in the opinion of Judge *Samuels*.

Price and *Caperton*, for the appellants.

N. Harrison and *Stanard*, for the appellees.

SAMUELS, *J.* This cause is brought here by *superseas* to a judgment of the Circuit court of Monroe county, rendered upon a special verdict in an action of ejectment, wherein the defendant here was plaintiff, and the plaintiffs here were defendants.

The finding of the jury shows this case: John Thompson was seized in fee of the land in controversy, and departed this life in June 1823. He left seven children, and several grand children, the issue of two sons who had died in the life time of their father; the lessors of the plaintiff are some of the children and grand children of the deceased claiming as heirs,

* Sess. Acts of 1836-7, p. 11, § 10: Be it further enacted, that all writs of *formedon in decender, remainder or reverter*, of any lands in that part of this commonwealth which lies west of the Alleghany mountains, hereafter to be brought upon any title or cause heretofore accrued, or which may hereafter fall or accrue, in that part of this commonwealth, of lands situated there, shall be sued within seven years next after such title or cause of action accrued, and not afterwards; and that no person or persons who now hath or have, or hereafter may have, any right or title of entry into any lands, shall make an entry but within seven years next after such right or title accrued; and such person or persons shall be barred from any entry afterwards: provided nevertheless, if any person or persons entitled to such writ or writs, to such right or title of entry as aforesaid, shall be or were under the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, at the time such right or title accrued or came to them, every such person, and his or her heirs, shall and may, notwithstanding the said seven years are or may be expired, bring and maintain his or her action, or make his or her entry, within three years next after such disabilities removed, or the death of the person so disabled, and not afterwards.

and others claiming by purchase from others of the heirs.

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The defendants below also claim title as derived from John Thompson deceased. It appears that after the death of the ancestor in June 1823, and before August 29th of that year, Samuel Thompson, one of his sons and heirs at law, entered upon the land in controversy, claiming that his father had left a will wherein he devised the land in controversy to said Samuel for life, remainder to said Samuel's wife for life, remainder in fee to John Thompson and William Thompson, the sons of said Samuel. This alleged will was not found after John Thompson's death. Samuel Thompson, however, having taken possession of the land at some time after his father's death in June 1823, and before the 29th of August of that year, on the day last named instituted a suit in chancery in the District court of chancery holden at Lewisburg, alleging the due making of the will devising the land to the complainant, his wife, and sons, as above stated; that the will was in force at testator's death; that it could not be found; and praying that the whole will, or so much of it as devised the land to complainant, his wife, and sons, might be established. To this bill the heirs at law of John Thompson were made defendants, and served with process to answer. Under this color or claim of title Samuel Thompson took and held the exclusive possession of the land during his life. After his death the parties claiming under the will successively took and held the land for their own use, to the exclusion of John Thompson's other heirs at law. The title thus claimed has been transmitted by intermediate alienations, until equal moieties of the land vested in the parties Caperton and Tiffany respectively, who are the plaintiffs here, and who were in possession at the time of bringing this suit, using and enjoying the property as their own.

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The entry and possession of Samuel Thompson must, under the circumstances, be held to have been adverse to the other heirs at law of his father, John Thompson. A will, although not admitted to probat, is a valid will of land. *Bagwell v. Elliott*, 2 Rand. 190. And the record shows that Samuel Thompson had reason to insist on his claim under the alleged will. The exclusive use and enjoyment of the property in the hands of the several and successive holders, accompanied with a denial of all right in the parties now claiming as coparceners, from 1823 to 1848, when this suit was brought, is such an adverse possession as is protected by the statute of limitations. See *Shanks v. Lancaster*, 5 Gratt. 110; *Purcell v. Wilson*, 4 Gratt. 16.

The defendant must be barred by the statute, unless it can be shown that his lessors, or some of them, are exempt from its operation. The counsel for the defendants here seek to withdraw all the lessors of the plaintiff from the bar of the statute, for several reasons: As that the entry and possession by Samuel Thompson, one of the coparceners, must be regarded as the entry and possession of all the coparceners; and, therefore, the statute did not run. Conceding that the entry and possession by one coparcener enures to the benefit of all in the absence of proof to the contrary, yet when it appears that the coparcener entering and taking possession claimed the property as his own under color of title; that he took the profits to his own exclusive use, and denied the title of the other coparceners, of all which they had notice, the party so taking and holding is regarded as having dis-seized his coparceners. See *Clymor's lessee v. Dawkins*, 3 How. S. C. R. 674; *Ricard v. Williams*, 7 Wheat. R. 59; *McClung v. Ross*, 5 Wheat. R. 116; *Purcell v. Wilson*, 4 Gratt. 16.

Another reason for which the counsel sought to withdraw all the plaintiff's lessors from the operation

of the statute is the fact that Samuel Thompson, after his entry, filed a bill in chancery against the other heirs at law seeking to establish the alleged will of their common ancestor; that this bill was pending until the year 1837, when it was dismissed for a failure to give security for costs, which complainants had been required to give. The answer is obvious, that the statute commenced running the day Samuel Thompson disseized the other heirs; and the course of the statute would not be arrested by anything occurring subsequently. The further answer is equally obvious, that this cause was decided in a court of common law jurisdiction, which court necessarily decided it upon its own rules and principles, without reference to the principles governing chancery courts. Without doubt, in the absence of any injunction restraining the lessors of the plaintiff from making an entry or from bringing suit, the law court must allow full force to the statute. The chancery suit was not brought for the purpose of *acquiring* title; that, as was alleged, had been acquired by the will and the death of the testator: It was brought to establish the evidence of the title. It would be strange if a party in possession of property, claiming it under color of title, should lose the protection of the statute by making an ineffectual effort to procure evidence to sustain his title.

The defendants here further sought to obviate the effect of the statute by the suit for partition brought in 1844, in which suit an order was made requiring complainants to establish their title by suit at law, under which order this suit was brought. In the view I take of the subject, this suit for partition is wholly without the effect ascribed to it, as, if the statute applied at all, it had run its course before the suit was brought: The adverse entry was made before the 29th of August 1823; the suit for partition was commenced 21st of March 1844. If the complainants in

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the suit for partition had alleged and proved any equitable reason to repel the statute, the chancery court might have given effect to such reason by an appropriate order when directing the suit to be brought for trial of title. No reason of this nature is shown, no such order of the court was made; and the statute is thus left to have the operation which a common law court ascribes to it.

The counsel for the defendants here, if they may not exempt all the lessors from the bar of the statute, yet seek to exempt some of them by bringing them within the proviso in favor of *femes covert* and infants.

At the time of John Thompson's death, some of his heirs, that is to say, Margaret the wife of Isaac Cole, Elizabeth the wife of Joseph Canterbury, Isabella the wife of Willis Ballard, and Jane the wife of Samuel Gregory, were *femes covert*. The first named three of these *femes* still survive, and have continually remained *covert* since the death of John Thompson; and they unite with their husbands in this suit. Jane Gregory lived until 1832, when she died, leaving issue and leaving her husband, Samuel Gregory, surviving; he died in 1833. The issue of Jane Gregory are lessors of the plaintiff in this suit. The title of Canterbury and wife, who unite as lessors of the plaintiff, was divested by the decree of a court of competent jurisdiction, and vested in Nancy Thompson for life; remainder in fee to her sons, John and William, under whom the plaintiffs here claim; no recovery, therefore, can be had under this title.

The titles of Cole and wife and Ballard and wife stand upon a different footing from that of Jane Gregory's heirs; and must be separately considered. That title descended from John Thompson to the *femes* when they were *covert-baron*, in which condition they have hitherto continually remained. Samuel Thompson made his adverse entry upon the land alleged to

have descended, whereof the husbands and wives were jointly seized in right of the wives, thereby putting these parties to their right of entry, and giving them cause of action to recover possession.

The question whether the statute is a bar under such circumstances has never before occurred in this court; it must, therefore, be decided upon the terms of the statute itself, applied to estates of the nature of this, and claimed by parties in their condition. We must look to the decisions of other courts upon the question.

The statute giving the rule is found in Sess. Acts 1837, p. 11, § 10. The body of the enactment includes all rights of entry, by whomsoever held; and creates a bar in seven years. The proviso declares, "that if any person or persons entitled to such writ or writs, to such right or title of entry, as aforesaid, shall be or were under the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, at the time such right or title accrued or came to them, every such person, and his or her heirs, shall and may, notwithstanding the said seven years are or shall be expired, bring and maintain his or her action, or make his or her entry, within three years after such disabilities removed, or the death of the person so disabled, and not afterwards."

The body of the statute gives seven years to every party having a right of entry in which to assert the right, and interposes a bar after that time; the proviso gives a further time of three years to parties under disability: this three years to be computed from the removal of the disability. The period, if any, between the end of the seven years and the beginning of the three years, is not, in terms, withdrawn from the operation of the statute.

In regard to an infant, and a person *non compos mentis*, it has been decided that the right of action exists

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continually from its accrual until the end of the time allowed after the disability removed: that suit may be brought by such parties after the end of the time prescribed as a bar, and before the beginning of the time secured by the proviso. However this may be in regard to such persons, a *feme covert* stands on a different ground. She and her husband are jointly seized in her right: but the husband has also certain interests in the property, and capacity to dispose of such interests without the concurrence of the wife, and against her consent. He may invest another with seizin by conveying a freehold estate for the joint lives of himself and wife; and if issue be born, (Cole and wife had issue,) the husband may convey the property for his own life; his estate by the curtesy intervening before that of the heirs of the wife. The husband may moreover subject the freehold estate for the joint lives of himself and wife, or for his own life in case issue be born, to the payment of his debts. See Clancy on the Rights of Married Women 161; Bac. Abr. Baron & Feme C. 1; *Watson v. Watson*, 10 Conn. R. 75, 91, Judge Church's opinion. If the husband may do all this by direct conveyance; if he may thereby deprive himself and wife of a right of entry for their joint lives, I perceive no reason why he may not allow his and her right of entry to pass away by operation of law. This construction of the statute is sustained by Littleton, § 403, and the commentary thereon, 3 Tho. Coke Litt., p. 47; *Moore v. Jackson*, 4 Wend. R. 58.

I am of opinion that no recovery can be had in this action under the title of Cole and wife, or that of Ballard and wife.

The sixth count in the declaration is upon the demise of Jane Gregory's heirs; and upon this count only judgment was rendered for the plaintiff by the Circuit court. As already said, Jane Gregory's title descended to her heirs, and is somewhat different from

those of Cole and wife and Ballard and wife. Mrs. Gregory was a *feme covert* at the time her right of entry accrued in 1823; and so continued until her death in 1832. She left her husband surviving, who died in 1833. She also left children her heirs at law, who were infants under the age of twenty-one years at the time of her death, to whom descended her right of entry, with capacity to make the entry after the death of the husband. This entry was not made nor suit brought by the heirs within three years after their capacity to do either had accrued to them, nor within the further time allowed by the act of 1837. The question is thus presented, Whether their right is protected by the proviso?

It is insisted by the counsel for the defendant in error, that the possession of Samuel Thompson, and of those holding in succession after him, was not adverse to Jane Gregory at any time during her life; and as a consequence, she was not under the necessity of relying on the proviso to preserve her rights: that the possession became adverse after her death, and that her heirs are the parties to whom the right of entry on the adverse possession for the first time accrued. This position of the counsel, to be of any avail, must be true in all its parts; for if the right of entry accrued to Jane Gregory in her life time, her coverture must be relied on to save the right of entry in her person: her heirs in that case can claim only the benefit secured to them as her heirs. That the possession of Samuel Thompson and others holding after him was adverse to John Thompson's other heirs has, I conceive, been fully shown. Jane Gregory's right of entry would then be preserved only by her coverture; and her heirs can recover only by showing an entry, or suit brought, within the time allowed to them for these purposes. Is this the full period allowed to parties who are infants "at the time such right or title

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accrued or came to them," or is it only the three years allowed to the heirs of one whose right of entry has once already been protected? I think the latter. Jane Gregory's right of entry, whatever it was, descended at her death to her heirs; her right up to that time was protected by the proviso: her heirs, however, in express terms, are bound, unless they enter within three years, no disability of theirs being protected. Yet this plain language is to be set at naught, if the counsel be right; the heirs are not to be regarded as heirs succeeding to a limited right of entry, but as infants "*at the time* such right or title accrued or came to them." We must take a new departure in the computation of time; we must hold that the heirs do not take the right of entry held by the ancestor, but a renewed and prolonged right, to be transmitted, perchance, to other infant heirs, with a renewed right engrafted thereon and still further prolonged: and thus onwards indefinitely. Such a construction I regard as at war alike with the letter and purpose of a statute of limitations. Our act of assembly is substantially copied from the statute 21 James 1, ch. 16. The English courts hold that an heir under disability, acquiring a right of entry by descent from an ancestor also under disability, cannot claim the whole time allowed by the statute to a party in whom the right originally vested to make the entry, but that the heir may only claim the time secured by the proviso to a party taking derivatively by descent.

An English court, acting on established principles, in applying a statute like ours in the case of Jane Gregory's heirs, would hold that the heirs, notwithstanding their disability of infancy, could enter only within three years after their right of entry accrued. See *Doe v. Jesson*, 6 East's R. 80.

Justice McLean, in delivering the opinion of the Supreme court of the United States in *Mercer's lessee v.*

Selden, 1 How. S. C. R., at page 55, in regard to the right of Mrs. Swaim's infant heirs, who were alleged to have acquired a right of entry from their mother, a *feme covert*, says, "They were bound, without regard to their infancy or other disabilities, to bring their action in ten years from the decease of their ancestor." This was the construction placed upon the statute of limitations of Virginia existing prior to the act of 1837, and applying at that time throughout the whole state. The act of 1837 prescribes different times of limitation for lands lying west of the Alleghany mountains. The old and the new statutes, however, are identical in all particulars except time and the territory to which they apply. Thus the decision of the case is directly upon the question in which Jane Gregory's heirs are concerned; and is adverse to their pretensions. See also *Floyd's heirs v. Johnson et al.*, 2 Litt. R. 109, in which the same question is decided in the same way; *Moore v. Jackson*, 4 Wend. R. 58.

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Following these decisions, as giving the true meaning of the statute, as well according to its letter as to its obvious spirit and policy, I am of opinion no recovery can be had under the title asserted by Jane Gregory's heirs.

Having thus passed upon the title of each one of John Thompson's heirs, in whose behalf an attempt could be made to exempt them from the statute of limitations, on the facts found in the verdict, and finding the attempt in regard to each without foundation in law, I am of opinion to reverse the judgment of the Circuit court, and to render a judgment for the plaintiffs in error.

MONCURE and LEE, *Js.* concurred in the opinion of *Samuels, J.*

JUDGMENT REVERSED.

Lewisburg.**HOBBS v. SHUMATES.**

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1. A party claiming title under a deed from a deputy sheriff, for land sold for nonpayment of taxes under the act of February 9th, 1814, must show that the person described as high sheriff was such, and the grantor in the deed was his deputy.
2. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey.
3. A deposition purporting in the caption to have been taken in the state and county designated in the commission and notice, and certified by a person who adds to his name the letters J. P., is duly authenticated.

This was a writ of right brought in the Circuit court of Giles county by Thomas J. Hobbs against Thompson and Wilson Shumate, for the recovery of a tract of land containing fifty acres. On the trial the demandant having first proved that Michael Erskine was deputy sheriff of Monroe county, Virginia, at the time he sold and conveyed to William Vawter, under whom the demandant claims, the land which is alleged by the demandant to be the land in controversy, then proposed to offer in evidence the deed executed by Erskine to Vawter. This deed bore date the 30th day of August 1815, and purported to be by Michael Erskine, deputy for William Haynes, high sheriff of the county of Monroe, of the one part, and William Vawter, of the other part; and recited that Erskine, as deputy of Haynes, sheriff, "after having given notice by advertisement as well in the Virginia Argus, a public paper, as at the court-house door of the said county, agreeably to law, previous to the August court of said county, did expose to sale at said court-house whilst the court was in session, at the August term

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aforesaid, the lands heretofore returned delinquent for the nonpayment of taxes due thereon in the county aforesaid; whereupon William Vawter became the purchaser of a tract of land containing fifty thousand acres, which formerly belonged to, and was returned delinquent in the name of, Andrew Beirs, for the years," &c.: And it then proceeded to convey the land to Vawter. The tenants objected to the introduction of the evidence; and the court refused to permit the deed to go in evidence before the jury as anything or for any purpose, save that of color of title, until the demandant should first establish that all the requirements of the law as to the sale had been complied with: And the demandant excepted.

The demandant further offered in evidence the deposition of Erskine, who lived in Texas. The commission under which this deposition was taken was directed to any commissioner appointed by the governor of Virginia, or to any justice or notary public of Guadalupe county, in the state of Texas. The deposition purported on its face to have been taken in that county; and the certificate was headed, "*State of Texas, Guadalupe county, to wit:*" and was signed, "S. B. MOORE, J. P. (*Seal.*)" The court refused to admit the evidence: And the demandant again excepted.

There was a verdict and judgment for the tenants, whereupon the demandant applied to this court for a *supersedeas*, which was awarded.

N. Harrison, for the appellant.

Caperton, for the appellees.

ALLEN, P. This was a writ of right, in which there was a verdict and judgment for the tenant. On the trial the demandant filed two bills of exceptions to decisions of the court against him. By the first bill

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of exceptions it appears, that the demandant having first proved that Michael Erskine was deputy sheriff of Monroe county at the time he sold and conveyed to William Vawter, under whom the demandant claimed the land alleged by him to be the land in controversy, proposed to offer a deed in evidence which is set forth in the bill of exceptions. It purports to be a deed executed by said Erskine, deputy for William Haynes, high sheriff of Monroe county, to said Vawter, and recites that pursuant to the act concerning taxes on land, passed on the 9th of February 1814, the said Erskine, as such deputy, after having given notice by advertisement in the Virginia Argus, a public paper, and at the court-house door of said county, according to law, previous to August court, exposed to sale at said court, the lands theretofore returned delinquent for the nonpayment of taxes in said county; and thereupon William Vawter became the purchaser of a tract of fifty thousand acres, which formerly belonged to, and was returned delinquent in the name of, Andrew Beirs, for the sum of five hundred and ninety-four dollars and twenty-four cents, &c. But the court refused to permit the deed to go in evidence as anything or for any purpose, save that of color of title, until the demandant should first establish that all the requirements of the law as to the sale had been complied with.

This court decided in the case of *Flanagan v. Grimmer*, 10 Gratt. 421, that a deed containing such recital of the circumstances of the sale, if shown to have been executed by a duly qualified officer, authorized by the law to sell lands returned delinquent for nonpayment of taxes, and to execute a conveyance to the purchaser, furnished *prima facie* evidence of the transfer of such title to the purchaser as, at the time the land was returned delinquent, was vested in the person in whose name it was returned, his heirs, &c.

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But that said deed was liable to be impeached, after the time for redemption allowed by the law had elapsed, by proof of irregularity appearing on the face of the proceedings; or by the fact appearing on the face of the proceedings, that the arrearage of taxes, for the nonpayment of which the land was sold, did not exist, according to section 38 of the act of February 9th, 1814. The *onus probandi* is cast upon the contesting party to show, by the face of the proceedings, such irregularity as affected the validity of the deed.

A similar principle has been established in the state of Kentucky, although it does not appear that their law contained any provision similar to the 38th section of the act of February 1814. By the law of that state the register was directed to sell such lands at the state-house, after advertising the sale, &c.; and he was empowered to execute deeds for the lands sold. Under this law it has been held, in numerous instances, that the deed of the register, purporting to have been made for the sale of land for taxes, implies, *prima facie*, a compliance with the requisitions of the laws under which the land was sold and the deed executed, liable to be repelled by proof that the law was not regularly pursued in making the sale; and that it is not necessary to the validity of the register's deed that it should recite that the land had been advertised according to the statute. *Allen v. Robinson*, 3 Bibb's R. 326; *Graves v. Hayden*, 2 Litt. R. 62; *Hickman v. Skinner*, 3 Monr. 210; *Terry v. Bleight*, Id. 271; *Curie v. Fowler*, 5 J. J. Marsh. R. 145. The statute in Virginia gives the same effect to the sheriff's deed which the courts of Kentucky ascribed to the deed of the register, because he was an officer of government presumed to do his duty; and the 38th section of the act of February 9th, 1814, limits the proof to repel this *prima facie* presumption to irregularities, &c., appearing on the face of the proceedings.

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The decision of the court, excluding the deed until the party offering it established that all the requirements of the law as to such sale had been complied with, reversed this rule, and cast the *onus probandi* on the grantee, instead of the contesting party. In this case it is stated that the demandant, having first proved that said Michael Erskine was deputy sheriff at the time of said sale and conveyance, offered the deed in evidence. The bill of exceptions does not state, in so many words, that he had proved that William Haynes was high sheriff. In *Rockbold v. Barnes*, 3 Rand. 473, it was held that where land was sold and a deed made by the deputy sheriff, it was indispensably necessary that there should be proof that one was sheriff and the other was deputy. In *Flanagan v. Grimmet* it did not appear from the bill of exceptions taken to the decision of the court rejecting the deed, that any such proof had been offered. This court held, under the authority referred to, that such proof was necessary. But as the bill of exceptions did not purport to set out all the evidence, and as it appeared that the court, when the deed was first offered, rejected it as evidence for objections appearing on the face thereof, thereby precluding any further proof in relation thereto, if such proof had not been offered or waived; the court below deciding upon the invalidity of the deed alone, and the bill of exceptions intending to present for revision the single question so decided; this court, considering that decision erroneous, reversed the judgment, and remanded the cause for a new trial, with instructions to admit the deed as *prima facie* evidence of such title as, according to the 37th section of the said act, it purported to vest in the purchaser, upon proof that the person therein named as sheriff was sheriff, and the other was deputy sheriff. In this case, perhaps, by a liberal construction of the bill of exceptions, it might be considered there was such proof, as it sets out that there was proof that Michael Erskine

was deputy, from which it might be inferred there had been proof that William Haynes was high sheriff. But be that as it may, the bill of exceptions shows that no objection was made to the deed on that account. The proof may have been offered, or have been waived, or probably, if required, could readily have been supplied, if the deed had not been rejected, for the purpose for which it was offered, on other grounds. Those grounds are set forth, and the bill of exceptions was designed to present for revision in the appellate court the correctness of that decision. In the judgment of the court, upon the question thus raised, there was error, according to the decision of this court in the case referred to; it not being incumbent on the purchaser holding under such a deed to do more to entitle himself to the benefit thereof than prove its execution and the official characters of the sheriff and deputy sheriff.

I think the court erred also in excluding the deposition set forth in the second bill of exceptions, upon the ground that it was not properly authenticated. The case falls within the principle decided in *Pollard's heirs v. Lively*, 2 Gratt. 216, which held that a certificate such as is found in this case, headed with the state and county, and signed by the party taking the deposition with his name and the letters J. P., is sufficient evidence of the fact that the deposition was taken by a justice of the peace.

The other judges concurred in the opinion of *Allen, J.*

JUDGMENT REVERSED.

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HILL v. MANSER & al.

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1. A surety in a forfeited forthcoming bond is a surety for the debt; and when he pays it, as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt: And the judgment, for the benefit of the surety so paying, is not extinguished, but transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired.
2. The surety in the forthcoming bond pays to the creditor a sum certain on the execution issued on the bond against the principal and himself, and takes a receipt as for money paid by him. The evidence of payment afforded by the receipt will not be repelled by proof of loose declarations that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the right to be substituted to the rights and remedies of the creditor.
3. The creditor having taken a deed of trust from the principal debtor to secure his debt, and the debtor having subsequently given another deed of trust upon the same and other property, to secure debts due to a third party, one of which was for money loaned to pay a balance due upon the judgment, of which this third party had notice, the surety in the forthcoming bond is entitled to have the property embraced in the first deed of trust applied to satisfy the amount he has paid, with interest on so much thereof as went to discharge the principal of the debt; and if that property does not discharge it, to have the land embraced in the second deed subjected to discharge the balance.

In October 1840 Samuel McD. Moore recovered a judgment in the Circuit court of Fayette county against John Hill, for one thousand six hundred dollars, with interest. On this judgment an execution was issued, on which Hill executed a forthcoming bond with Hiram Hill and Pleasant Hawkins as his sureties. This forthcoming bond was forfeited, and execution was awarded against all the parties in August 1841: And the execution was returned levied, and the property not sold for want of bidders.

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By deed bearing date the 12th of May 1842 John Hill conveyed to Hudson M. Dickenson two tracts of land, some slaves and other personal property, in trust, that if Hill did not pay the debt due to Moore by the 15th of the next August, the trustee should sell the property upon ten days' notice, for cash, and apply the proceeds to the payment of the debt.

On the 2d of September Moore received from Hiram Hill, in money, fee bills and bonds, the sum of five hundred dollars, and he gave to him a receipt of that date, for that sum received on account of Moore's execution against John Hill and others, issued from the Circuit court of Fayette county. On the same day John Hill and wife conveyed to Dickenson and William Tyree a number of tracts of land, including the two previously conveyed to Dickenson, and the slaves included in said deed, to secure a large amount of debt for which Miles Manser was bound, and also the sum of five hundred dollars, which Manser had agreed to pay to Moore in part satisfaction of his debt. And on the 16th of March 1844 John Hill and wife conveyed to the same trustee other lands and some personal property, to secure some of the same and other debts, which were due to Manser, or for which he was bound, one of which was the five hundred dollars which Manser had paid to Moore.

In June 1849 Hiram Hill filed his bill in the Circuit court of Fayette county, in which he stated the foregoing facts; and insisted that he was entitled to be substituted to the rights and remedies of Moore, to the extent of the sum of five hundred dollars, which he had paid upon the debt due from John Hill to Moore. And making John Hill, Manser, and the trustees, Dickenson and Tyree, parties defendants, he prayed that the court would enforce the judgment lien and other securities of Moore, by a sale of the incumbered property, or a sufficiency thereof to pay off the debt due

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to Moore ; and that he might be substituted to the benefit of the same to the full amount he had paid, with interest ; and for general relief.

Manser answered the bill, and denied that the plaintiff had paid five hundred dollars, or any other sum, as the security of John Hill. He said that the money, fee bills and bonds mentioned in the receipt of Moore were advanced by the plaintiff not as a payment, but to accommodate his brother, and to get some foreign fee bills settled ; and hence he made the arrangement, not as a payment as surety, but as an advance to his brother by way of loan : And therefore, he insisted, the doctrine of substitution did not apply to the case. That at the time he took the securities from John Hill, mentioned in the bill, he had no notice of any claim upon the property by lien of any kind held by the plaintiff. And that he had paid off the debt to Moore, and therefore on that account he would be entitled to substitution to all the securities of said Moore which he had at the time of payment.

Witnesses were examined, who spoke of conversations with Hiram Hill, in which they understood him to speak of the five hundred dollars he had paid to Moore as a loan to his brother, John Hill ; but the money was in fact paid by Hiram Hill to Moore, and it seems to have been considered by both John Hill and Moore to have been a payment by Hiram Hill.

The cause came on to be heard in September 1851, when the court dismissed the bill with costs. And thereupon Hiram Hill applied to this court for an appeal, which was allowed.

Caperton, for the appellant.

Price, for the appellee.

ALLEN, *P.* delivered the opinion of the court :

The court is of opinion that the appellant, as surety

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for John Hill in a forthcoming bond which was forfeited, became thereby surety for the debt; and when he paid the same as such surety, he became entitled, upon the principles of a court of equity, to all the rights of the creditor against the original debtor, subsisting at the time he became so bound for the debt; and that the judgment, for the benefit of the surety so paying, is not regarded as extinguished, but transferred with all its obligatory force against the principal, and constituting a legal lien upon his real estate owned at the date of the judgment and thereafter acquired. *Garland v. Lynch*, 1 Rob. R. 545; *Powell's ex'ors v. White*, 11 Leigh 309; *Robinson v. Sherman*, 2 Gratt. 178; *Leake v. Ferguson*, 2 Gratt. 419.

The court is further of opinion, that the receipt of the creditor, dated the 2d of September 1842, shows that the appellant on that day paid the sum of five hundred dollars to the creditor, on account of the execution issued on said forfeited bond against his principal and himself; and the evidence in the record, of loose declarations that he loaned his principal that sum, or that the witnesses understood it was a loan, do not show any intention on the part of the appellant to waive any legal right, or that in fact he knew, at the time of such payment, that the law raised any such right of substitution for his benefit.

The court is further of opinion, that it fully appears that the appellee had full notice of said judgment when he took from the said John Hill the deed of trust of the 2d day of September 1842, as by the terms of said deed provision was made thereby to indemnify the appellee for the sum of five hundred dollars, which he had bound himself to pay on said judgment, for said John Hill, at a future day.

The court is further of opinion, that the appellee is not entitled to priority on account of the payment of said last mentioned sum. No such claim is set up in

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the answer; and the appellee not being surety, if he intended or contemplated relying on previous liens, should have taken a transfer thereof; his was a loan to John Hill, for the security of which, together with other claims against said John Hill, he took his deed of trust aforesaid, and upon which alone he must rely.

The court is further of opinion, that as it appears that said John Hill, by a deed of trust duly executed, and acknowledged, and recorded on the 12th day of May 1842, conveyed sundry lands, together with personal property, to a certain Hudson M. Dickenson, in trust for the security and payment of said debt, the appellant is entitled to be substituted to the rights of the creditor under said deed of trust, and to require a sale by the trustee of the property conveyed by said deed of trust, or so much thereof as may be forthcoming, and the application of the proceeds thereof, or so much as may be necessary to pay said sum of five hundred dollars, with interest from the 2d of September 1842, on so much thereof as at the time of payment was applicable to the principal of said execution. And if the property described in said deed of trust of the 12th of May 1842, or so much thereof as may be forthcoming, should prove insufficient to pay said sum of five hundred dollars, with interest as aforesaid, then that the appellant should be at liberty to resort to any other lands owned by said John Hill at the date of said judgment, or afterwards acquired, for satisfaction.

The court is therefore of opinion, that said decree is erroneous, and it is reversed with costs against the appellant; and the cause is remanded to be further proceeded in according to the principles of the foregoing opinion and decree, in order to a final decree.

DAVIES and MANSEY, J., dissented.

DICKER KINGSLEY

Lewisburg.

HARRISON v. MIDDLETON.

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(Absent Allen, P.)

August 26th.

1. If a case of unlawful detainer has been pending in a County court for more than twelve months without a final decision, it may be removed, on motion, to the Circuit court.
2. All civil causes of which the Circuit court has either original or appellate jurisdiction may be removed from the County to the Circuit court, upon motion, after they have been pending in the County court for one year.
3. An unlawful detainer case removed to the Circuit court is properly placed on the docket at the head of the civil causes in the court.
4. A witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another; but he must then speak from his own recollection thus refreshed.
5. But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in court, may refer for the courses and distances to the diagram, though he may not be able to remember them independent of the diagram. The diagram is itself evidence, and he may point out on it what lines he ran.
6. An extract or copy taken by a surveyor from his field notes is not evidence; and he can only use it to refresh his memory, and must then speak from his recollection.
7. A witness is offered to be introduced, who is objected to as being interested, and proof *aliunde* of his interest is introduced. He is then examined by the party offering him, on his *voir dire*, to show that he has no interest, and this is objected to by the other party; but before he is sworn in chief a deed is produced which shows he has no interest. If it was error to examine him on his *voir dire*, it was cured by the introduction of the proof of his want of interest, before he was sworn in chief.
8. An agreement under seal by a tenant, that he will surrender possession whenever a purchaser from the landlord requires it, constitutes him a tenant at will or at sufferance; and he is not entitled to six months' notice to quit.
9. If a tenant claims to hold adversely to his landlord, he is not entitled to notice.

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10. A landlord sells land in possession of his tenant by agreement under seal, and the tenant refuses to deliver possession: The landlord is the proper party to institute a proceeding of unlawful detainer, to obtain possession.
11. If a deed of a defendant is introduced collaterally upon the trial, as evidence, he may show that it is not his deed, without making oath to the fact: And for this purpose may introduce a subscribing witness to it, to prove that it was misread to the defendant.
12. Proof that the deed when read was understood in a very material respect as different from what it is may tend to show that it was misread, and therefore is competent evidence. But if the deed was correctly read, the misunderstanding of it by a party cannot affect its validity as a deed.

This was a writ of unlawful detainer, brought in the county of Jackson, by Henry O. Middleton against Josiah Harrison, to recover possession of a tract of seven thousand nine hundred and twenty-three acres of land. The case was docketed in the County court of Jackson in June 1847, and was continued on the docket of that court without a trial until August 1848, when the court being about to adjourn, on the motion of the plaintiff, it was ordered that the case be removed to the Circuit court of Jackson county. And in September of the same year the plaintiff produced in that court the original papers, and the orders made in the cause, and on his motion it was docketed, and was placed at the head of the civil causes on the docket.

At the August term 1850 of the Circuit court, when the cause was called, the defendant, by his counsel, moved the court to strike it from the docket, on the ground that it was not one of the cases contemplated by the act of March 28th, 1843. Sess. Acts 1842-43, ch. 9. But the motion was overruled by the court: And he excepted. The defendant then moved the court to place the cause on what he insisted was its proper place on the docket, viz: only before such cases as had been brought in that court after the cause had been docketed there. But the court overruled the motion, because the case occupied the place on the

docket which it had occupied ever since it had come into the court; and had priority over all civil causes in the County court, and was entitled to the same priority in the Circuit court that it had in that court. And the defendant again excepted.

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On the trial of the cause the plaintiff introduced in evidence an agreement between himself and the defendant, bearing date the 22d of February 1847, in relation to the land in controversy. This agreement recited that Harrison lived on a tract of land of seven thousand nine hundred and twenty-three acres, patented to Thomas A. Taylor, under Taylor's representatives, as tenant; that Middleton had become the owner of the tract, and had sold it, and wished immediate possession: And then Harrison agreed to surrender the plantation and houses by the 10th of April 1847, and to surrender the farm at any time that William Fisher (the purchaser from the said Middleton) may think proper to take possession. And in consideration of Harrison's agreeing to give up as aforesaid, Middleton agreed to refer it to arbitrators to say what Harrison should be allowed for his improvements beyond the use of the plantation for the time he had enjoyed it. And it was agreed that, on signing that agreement, all controversy between the parties was to be at an end; and that Harrison was to give up to Middleton all claims and leases theretofore set up by him. The agreement was under seal and attested by three witnesses, of whom Alexander Harrison was one. The plaintiff also introduced the patent under which he claimed, which was a grant in 1786 to Thomas A. Taylor. He then called a witness, who stated that some years previous to the trial he surveyed two or three of the lines of the survey on which the defendant Harrison lived; that when he ran these lines he had no authentic document to run them by, and only had a paper with a diagram of the seven thousand nine

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hundred and twenty-three acre tract, which paper had an endorsement on it in the handwriting of the plaintiff, stating that it was the tract on which defendant lived; and which diagram was made by the plaintiff. To this diagram the witness referred for courses and distances, and admitted that he did not remember how far he had run, or what courses he had run, without reference to said paper, and did not remember either course or distance independent of the paper. To the witness refreshing his memory from said paper, the defendant objected, which objection was overruled by the court; and the witness often referred to the paper to refresh his memory; the court directing the witness not to state anything set out in the paper, but only to state what acts he did in running the lines aforesaid, and what he found on the ground. To this the defendant again excepted.

The same witness, in order to answer other questions propounded to him by the plaintiff, referred to a memorandum made by himself but two days before the trial, copied by him from his field notes of the survey before spoken of; the said field notes being then at his home; but he did not pretend to say that he recollected the courses or distances deposed to from said memorandum independent thereof. This evidence was also objected to by the defendant, because the original field notes, from which the copy was taken, were not produced. But this objection was also overruled; and the witness was permitted to refer to said paper to refresh his recollection of the running of the lines done by him. And to this the defendant again excepted.

In the further progress of the trial William Fisher was offered as a witness, and was objected to by the defendant; who offered the agreement between the plaintiff and the defendant, before mentioned, to prove his interest. This agreement stated that the land in controversy had been sold by the plaintiff to Fisher.

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The plaintiff then proposed to examine Fisher on his *voir dire*, to show that the agreement for the sale to him had been rescinded, and that he had no interest in the controversy. To this the defendant objected, because he had shown the interest of the witness otherwise than by his own oath. But the objection was overruled; and the witness was sworn on his *voir dire*, and stated that he had no interest, because he and the plaintiff had, by a contract made on the 5th of August 1847, rescinded the previous contract between them: And this contract of the 5th of August was produced, and provided especially for the rescission of the previous contract for the sale of the land in the possession of the defendant. To this the defendant again excepted. This witness, being sworn in chief, stated that previous to his purchase from the plaintiff he had heard the defendant say that he had no title to the soil on which he lived, and did not claim the land; and that in the spring of 1847 he was with the defendant, but not on or near the land, and asked him if he would give up its possession, to which the defendant replied that he would not.

In the further progress of the trial the defendant offered Alexander Harrison as a witness. He was a subscribing witness to the agreement aforesaid of the 22d of February 1847, between the plaintiff and defendant, and had been previously sworn and examined as to that fact by the plaintiff. This witness was offered by the defendant to prove that at the time of the execution of that agreement both the witness and the defendant, who was the father of the witness, understood said paper (which is in the handwriting of the plaintiff) as referring the title to the land to the arbitrators therein named; and that the witness was present when it was read to the defendant, and that both the witness and the defendant did not understand or believe that the said paper made the defendant the te-

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nant of the plaintiff, nor did they know that such a thing was in the paper. And further, that both the witness and the defendant understood said paper, as it was read to them, as simply referring to the arbitrators the question of right to the land; and not that the defendant had thereby given up his right to it, and referred to the arbitrators the defendant's title to compensation for his improvements, to be set off against the rents of the land. To the admission of this evidence the plaintiff objected, and the court sustained the objection: And the defendant again excepted.

After the evidence in the cause had been introduced, the plaintiff moved for an instruction to the jury, "that if they believed all the evidence before them, the plaintiff had a right to maintain his suit at the time of its institution, and was entitled to recover in this action." The court thereupon enquired whether the defendant intended to ask for any instructions; when he, by his counsel, objected to the instruction asked for by the plaintiff as being too broad and general, and asked the court to instruct the jury as follows:

1. That if they believed, from the evidence before them, that the defendant was, at the time of the institution of this suit, a tenant of the plaintiff, he was entitled to six months' notice to quit before he could be turned out as unlawfully detaining the land under the contract of February 1847; and that the language of said contract, "to surrender the farm at any time that William Fisher, the purchaser of Middleton, might think proper to take possession," was not a certain time, either in contemplation of law or by the true interpretation of the contract.

2. If the jury were satisfied from the evidence before them, that before the institution of this suit William Fisher had purchased the land in controversy of the plaintiff, and that such purchase, at the time this suit was instituted, was in force and not rescinded,

the plaintiff had no right to the possession of said land, and could not maintain this suit against the defendant.

There was a third instruction asked by the defendant substantially the same as the second.

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The court refused to give the instruction asked for by the plaintiff, because it was too general, and because it called on the court to decide upon the sufficiency of the evidence before the jury; and, declining to give the instructions asked for by the defendant in the form in which they were asked, proceeded to instruct the jury, "that if they believe from the evidence, that the defendant was, at the time of the institution of this suit, a tenant from year to year of the plaintiff, he was entitled to six months' notice to quit; and he would not be liable to be turned out of possession of the land in controversy without such notice: But if they should believe from the evidence, that the tenant was a tenant to the plaintiff, and that his time was to end at a certain time, that then no notice to quit would be necessary. The court further instructed the jury, that that part of the contract of the 22d of February 1847, which provides for the surrender of the farm at any time that William Fisher might think proper to take possession, would not necessarily create a tenancy from year to year, and entitle the defendant to six months' notice; and that if the evidence satisfied the jury that a demand of the possession had been made of the defendant by the said Fisher, and the defendant had refused to surrender such possession, it was not necessary to give the defendant six months' notice before the institution of this suit.

The court further instructed the jury, that they must be satisfied from the evidence, before they could render a verdict for the plaintiff, that at the time of the institution of this suit the plaintiff had the right of possession to the premises in controversy in this suit; and that the contract of the 22d of February

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1847, between the plaintiff and the defendant, did not, in the opinion of the court, of itself furnish such evidence of a transfer of the right of possession from the plaintiff Middleton to Fisher as to disable the plaintiff from maintaining this action in his own name, provided he has shown himself otherwise entitled to maintain it; or that the said contract so transferred to or vested in the said Fisher such right of possession as would have enabled him to maintain this action against the defendant. To the refusal of the court to give the instructions asked by him, and to the giving the instructions given by the court, the defendant excepted. There was then a verdict and judgment for the plaintiff; and on the application of the defendant, a *superseas* was awarded by this court.

Fisher, for the appellant, insisted :

1. That this was not a case which could be removed from the County to the Circuit court. That the case having arisen before the 1st of July 1850, the question was to be determined under the act of March 28th, 1843, Sess. Acts of 1842-43, ch. 9, § 4, p. 17. That from the time when the constitution of 1829 went into operation, the County and Circuit courts had concurrent jurisdiction in chancery causes; and in 1838 the act was passed authorizing the removal of such causes from the County to the Circuit courts; but that this act only applied where the Circuit court had original jurisdiction of the subject matter involved in the cause. In March 1843 the act was passed allowing the removal of common law causes "upon the same terms and in the same manner in all respects as if it were a suit in equity"; and therefore this act must be construed to apply to the same class of cases as the act of February 1838, which were cases in which the Circuit court might have taken original jurisdiction. This construction was confirmed by the act of February

7th, 1849, Sess. Acts 1848-49, ch. 75, § 1, p. 42, in relation to the removal of causes where the amount in controversy was under fifty dollars. And he insisted that this being indisputably a cause of which the Circuit court could not have taken original jurisdiction, it was therefore illegally removed to the Circuit court, and was therefore *coram non judice*, and all the proceedings were null and of no effect.

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2. That although a case of unlawful detainer has priority in some cases, yet that there is no law which gives it this priority where the special court fails to meet, and the cause goes regularly on the docket of the County court.

3. That the court erred in permitting the witness to refer to the diagram and a copy of his field notes, and to state facts from them of which he could not speak of his own recollection. 1 Greenl. Evi. § 436; 1 Stark. Evi. 128; *Doe ex dem. Church v. Perkins*, 3 T. R. 749.

4. That the court erred in swearing the witness Fisher to ascertain his want of interest, after the defendant had proved his interest. *Vincent v. Huff's lessee*, 4 Serg. & Rawle 298; 2 Stark. Evi. 756; *Offutt v. Twyman*, 9 Dana's R. 43.

5. That the court erred in excluding the evidence to prove that the agreement of the 27th February 1847 had been misread to the defendant. If the paper had been the foundation of an action of covenant, the evidence would have been admissible: And it was *a fortiori* admissible when the paper was offered collaterally. 1 Chitty's Plead. 479; *Van Valkenburgh v. Rouk*, 12 John. R. 337; *Taylor v. King*, 6 Munf. 358. This last case is conclusive of the question. It decides that if a paper is misread to a party, he may plead *non est factum*.

6. That the court erred in refusing to give the instructions asked for by the defendant. The contract

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under which the plaintiff claims bears date in February 1847; and that shows he had sold the land to Fisher. The proceeding was commenced in June of that year; and the contract with Fisher for the rescission of the sale bears date in August. Not the plaintiff, but Fisher, was entitled to the possession at the time this proceeding was commenced. Or if Fisher was not the party to bring this action, neither can the plaintiff do it. Fisher had purchased from him, and he claimed as purchaser from Taylor's heirs, under whom Harrison had been in possession for years. If Fisher's purchase from the plaintiff did not authorize him to sue, neither could the plaintiff's purchase from Taylor's heirs (it not appearing that he had received a conveyance) entitle the plaintiff to sue.

But further: A tenant is entitled to six months' notice to quit. It is true this law does not apply to a tenancy which is to determine at a fixed period, nor where there is an express agreement to dispense with notice. But the only time fixed, and the only agreement, is when Fisher shall think proper to take possession; which is neither certain as to time, nor does it dispense with notice: Nor, indeed, is there satisfactory proof of any demand of possession by Fisher.

7. That the instructions given by the court were improper and erroneous: Improper, because the instructions were not asked for by either party; and because it referred the construction of the written agreement to the jury, when it should have been construed by the court: And it was erroneous, in so far as it varied from the instruction asked for by the defendant.

Price, for the appellee:

The first point made by the appellant's counsel must depend upon the construction of the act of March 28th, 1843. That act says, "Whenever any civil

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action in a court of law shall have been, or shall hereafter be, pending in a County court for the space of one year, without a final decision thereof having been made, it shall be lawful," &c. Is this a civil action? If it is, and who doubts it, it is embraced within the terms of the law. It is equally embraced within the spirit and object of the act. The object is to obviate the delays of the County court. It is true the act refers to the act of 1838, but that relates to the time and manner of removing the cause. The object of the statute and its language apply to all cases in which the Circuit court has either original or appellate jurisdiction.

Upon the second point made by the appellant's counsel, the court allowed the witness to refer to the papers to refresh his memory, but he was only to state what he then remembered. And this seems to be the settled rule on the subject. 1 Greenl. Evi. § 436. This author says, it is not necessary that the paper referred to should have been written by the witness, or should be an original paper. It matters little how the memory is refreshed; but the witness is to speak from his then recollection.

As to the competency of the witness Fisher: It was a question before the court; and not only his competency was shown by the evidence, but by the contract for the rescission of his purchase.

Upon the fifth point made by the counsel for the appellant, it is to be observed that the evidence was not offered to prove that the agreement was not correctly read, but that it was not correctly understood. The design of this evidence was to invalidate the deed; and if it was not sufficient for that purpose, it was not admissible.

But further: The evidence, if competent, was not admissible without the affidavit of the defendant that

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the paper was not his deed. The court is referred to 3 Bac. Abr., title Fraud, letter A, p. 294-95.

Upon the instructions given or refused, it is enough to say that the objection that the court should have construed the agreement is not well taken, as the court does in fact construe it in the instruction given. That this was not a tenancy from year to year, so that the law in relation to notice does not apply; and there was in fact a positive agreement to give up the premises whenever required by Fisher, which of course dispensed with notice. As to Fisher's right, his was a mere executory contract, giving him neither title or right of possession, which still remained in Middleton; and it was for him to enforce it, that he might execute his contract with Fisher.

MONCURE, *J.* I am of opinion that the Circuit court did not err in overruling the motion of the defendant to strike this case from the docket. I think the case was properly removed from the County court to the Circuit court, under the fourth section of the act of March 28, 1843, (Sess. Acts, p. 18,) which declares "that whenever any civil action in a court of law shall have been, or shall hereafter be, pending in a County or Corporation court for the space of one year, without a final decision thereof having been made, it shall be lawful for any party in any such civil action, or his or her legal representatives, to obtain, by motion, without notice, an order of such court for the removal of such cause to the Circuit superior court of law and chancery of the same county or corporation, upon the same terms, and in the same manner in all respects, as if it were a suit in equity, and the same proceedings shall be had in reference to the removal and trial of such causes as are directed by the act passed the 18th (12th) of February 1838, (Sess. Acts, p. 61,) entitled 'An act to authorize the removal of

causes in equity from the inferior to the superior courts.'” The case at the time of its removal was a civil action in a court of law, and had been pending in the County court for the space of one year, without a final decision thereof having been made. It was, therefore, within the literal terms of the statute. Was it not within its spirit and meaning also? I think it was. The manifest object of the statute was to avoid the great evil of delay in the trial of causes in the County courts. This evil existed in regard both to chancery suits and civil actions; but in a greater degree to the former. The act of 1838 was intended to remedy the evil in regard to chancery causes, and the act of 1843 in regard to civil actions. The action of unlawful detainer is peculiarly and especially within the scope of the policy of the legislature, as indicated by these acts. It is a remedy for a wrong which requires immediate redress. The law has, therefore, provided that it shall be prosecuted in a most summary way, and have precedence for trial over all other civil causes. It was probably not contemplated by the legislature that such a proceeding for the redress of such a wrong would ever “be pending in a County court for the space of one year, without a final decision thereof having been made.” But if it would, surely the legislature intended that it might be removed to the Circuit court, in the same manner in which any other civil action, under similar circumstances, might be so removed under the act of 1843.

The ground on which the counsel of the plaintiff in error contended that the action of unlawful detainer is not a civil action, within the meaning of the act of 1843, is that that act applies only to civil actions of which the Circuit court has original jurisdiction; and the Circuit court has not original jurisdiction of an action of unlawful detainer. It is true that the Circuit court has not original jurisdiction of an action of

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unlawful detainer. The only reason for not giving such jurisdiction is, that the nature of the wrong for which the remedy lies requires a more speedy redress than could well be afforded by that court, sitting as it does but twice in a year.

Formerly the County court, though holding a session every month, was not considered by the legislature as affording the means of a sufficiently speedy redress of the wrong; and, therefore, a tribunal composed of at least two justices, and meeting not less than ten nor more than twenty days after the date of the warrant, was provided for the trial of actions of unlawful detainer. They are now triable by the County court, but at any term, whether monthly or quarterly; and are still tried in a summary way, and have precedence over all other civil causes on the docket. But while the Circuit court has never had original, it has always had appellate jurisdiction in actions of unlawful detainer; and I think the act of 1843 was not intended to be confined to civil actions of which the Circuit court has original jurisdiction, but was intended to embrace all civil actions of which that court has jurisdiction, whether original or appellate. I can see no good reason for the restrictive meaning contended for, contrary to the literal terms and obvious policy of the act. It was contended that as the act of 1843 declares that the same proceedings shall be had in reference to the removal and trial of causes under that act as are directed by the act of 1838 in regard to causes in equity; and as the act of 1838 declares that the Circuit court shall have the same jurisdiction of a cause in equity removed under that act, and shall proceed therein in all respects as if the cause had been originally instituted in that court; therefore no civil action of which the Circuit court has not original jurisdiction can be removed under the act of 1843, because no case in equity of which the

Circuit court has not original jurisdiction can be removed under the act of 1838. In other words, it was contended, if I rightly understood the argument, that the act of 1843, in consequence of its reference to the act of 1838, is to be read as if the words, "and the Circuit superior court shall have the same jurisdiction thereof, and shall proceed therein in all respects as if the cause had been originally instituted in the Circuit superior court," which are contained in the act of 1838, had been repeated in the act of 1843. And that as an action of unlawful detainer could not be originally instituted in the Circuit court, therefore that court could have no jurisdiction thereof, if removed from the County to the Circuit court. This argument, though plausible, is, I think, unsound. The words referred to were not used in the act of 1838 for the purpose of excluding from its operation any causes in equity of which the County court had jurisdiction and the Circuit court not; for there were no such causes. If the jurisdiction of the two courts in such causes was not entirely concurrent, certainly the Circuit court had jurisdiction of every cause in equity of which the County court had. The words could only have been used for the purpose of giving to the Circuit court the same jurisdiction of a cause in equity removed to it as of a cause instituted therein. Different words might and probably would have been used if there had been any causes in equity cognizable in the County, and not in the Circuit, court; but, as there were not, the words used conveyed the idea intended as well as any that could have been selected. The act of 1843 refers to the act of 1838 merely to avoid repetition; and the legislature could not have intended, by the implied adoption of ambiguous words, to exclude from the operation of the former the action of unlawful detainer, which, as I have already said, is embraced both by the letter and the spirit of the act.

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The act of February 7th, 1849, Sess. Acts, p. 42, though passed after the removal of this case, was referred to in the argument as serving to show that prior to that act a civil action, in which the Circuit court had not original jurisdiction, could not have been removed from the County to the Circuit court under the act of 1843. The act of 1849 is somewhat of the nature of a declaratory law. At all events, while it adopts a rule for the future, it does not even express the opinion of the legislature as to what had been the true rule before. It recites that different constructions had been put upon the 30th section of the act of April 16th, 1831, Sup. Rev. Code, p. 146, and the 4th section of the act of March 28th, 1843, and that it was desirable to have uniformity in the construction of the said sections. It then declares that the Circuit courts shall have power to award a writ of error and *supersedeas* to any judgment, &c., of the County courts in which the latter have original jurisdiction; and to order the removal of any civil action pending in such courts, in the manner provided in the fourth section of the last recited act, notwithstanding that the amount in controversy in such judgment, &c., may be less than fifty dollars.

When the act of 1849 was passed the Circuit court had no original jurisdiction in pecuniary actions, in which the amount in controversy was less than fifty dollars; and it seems to have been supposed by some that the Circuit court had no appellate jurisdiction in such cases. Those who entertained that supposition, as a natural consequence, also supposed that, as the Circuit court had neither original nor appellate jurisdiction in such cases, they could not therefore be removed from the County to the Circuit court under the act of 1843. And hence the act of 1849 was passed to remove all doubt on the subject, by declaring that the Circuit court should have jurisdiction of such cases, whether removed to it by writ of error, &c., un-

der the act of 1831, or an order of removal under the act of 1843.

The act of 1849 indicates the sense of the legislature that the jurisdiction of the Circuit court under the act of 1843 should be coextensive with its appellate jurisdiction. The words, "notwithstanding that the amount in controversy in such judgment, &c., may be less than fifty dollars," were certainly not designed to exclude the jurisdiction of the Circuit court in an action of unlawful detainer removed to it under the act of 1843. It would be strange, indeed, if the legislature intended by the act of 1849 to confer jurisdiction on the Circuit court, under the act of 1843, in cases in which it had not original, and was supposed by some not before to have had appellate jurisdiction, and at the same time to exclude its jurisdiction under that act in a case in which it always had appellate jurisdiction.

I am further of opinion that the Circuit court did not err in overruling the motion of the defendant to change the place of the case upon the docket; and that the reason assigned by the court, to wit, "because this case occupied the place on the docket which it has occupied ever since it came into this court, and had priority over all civil causes in the County court, and was entitled to the same priority here that it had in that court," was well founded, and a good reason for overruling the motion. If, however, there had been any error in this respect, I do not see how it could have prejudiced the parties, or been any ground for reversing the judgment.

In regard to the exceptions of the defendant to opinions of the court permitting a witness, who had surveyed, or partially surveyed, the land in controversy for the plaintiff, to refresh his memory by referring to certain papers which he had in his hand: The law on this subject is thus laid down in Greenl. on

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Evidence, § 436 : " Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection." " And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence." Numerous authorities are cited by the author, which, I think, fully sustain his view of the law ; though there is certainly some conflict, at least in the *dicta* of some of the judges.

The doctrine established by the authorities seems to be that if a witness, after looking at the paper to recall the facts, can speak from his own recollection of them, and not merely because they are stated or referred to in the paper, his evidence will be admissible, notwithstanding the manner in which his recollection was revived, and no matter when or by whom the paper was made, nor whether it be original, a copy, or an extract, nor whether referred to by the witness in court or elsewhere. 4 Philips' Evi. ; Cowen & Hill's Notes, part 2, p. 734. This kind of testimony is liable to abuse ; the chief objection to it being that the paper referred to operates on the mind of the witness like a leading question : but it is rendered necessary by the frailty of the human memory ; and the abuse to which it is liable must be guarded against by the vigilance of the court. If, after looking at the paper, the witness cannot speak from his recollection merely, his testimony, so far as he cannot speak from his recollection, is inadmissible ; and the paper itself, if admissible evidence, either alone, or so far as it may

be supported by the recollection of the witness or other testimony, must be produced. In *Jacob v. Lindsay*, 1 East's R. 460, the witness was permitted to refer to a paper which itself was not admissible evidence. In *Henry v. Lee*, 2 Chitty's R. 124, 18 Eng. C. L. R. 273, a witness was allowed to refresh his memory from a document, though not written by himself. "It is sufficient," said Lord Ellenborough, C. J., in that case, "if a man can positively swear that he recollected the fact, though he had totally forgotten the circumstance before he came into court; and if, upon looking at any document, he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum was written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness."

I see nothing in Starkie on Evidence, nor in the case of *Doe ex dem. Church v. Perkins*, 3 T. R. 749, so much relied on by the counsel for the plaintiff in error, which is in conflict with the doctrine as laid down by Greenleaf. On the contrary, the case of *Doe v. Perkins* is one of the cases cited by that author, and tends to support the doctrine. The point decided therein, as stated in the marginal abstract, was that a witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection, any further than as finding it entered in a book or paper, the original book or paper must be produced. Mr. Justice Buller, in *Doe ex dem. Church v. Perkins*, referred to a case of *Tanner v. Taylor*, in which, being an action for goods sold, "the witness who proved the delivery took it from an account which he had in his hand, being a copy, as he said, of the day book, which he had left at home: and it being objected that the original ought to have been produced, Mr. Baron Legge said that if he would swear

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positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it; but if he could not, from recollection, swear to the delivery, any further than as finding them entered in his book, then the original should have been produced; and the witness saying he could not swear from recollection, the plaintiff was nonsuited."

This doctrine is of easy application to the case under consideration. The witness was permitted to refer to two papers to refresh his memory. The first was an original paper; being a diagram made by the plaintiff of the tract of land claimed by him, which paper had an endorsement thereon in the handwriting of the plaintiff, stating that it was the tract on which the defendant lived. The witness stated that some years before he surveyed two or three lines of the survey on which the defendant lived, and when he run the lines he had no authentic document to run them by, and only had the paper with the diagram and endorsement aforesaid. To this diagram the witness referred for courses and distances, and admitted that he did not remember how far he had run, or what courses he had run, without reference to said paper, and did not recollect either course or distance independent of said paper. To the witness refreshing his memory from said paper, the defendant objected; but the court overruled the objection, directing the witness not to state anything set out in the paper, but only to state what acts he did in running the lines aforesaid, and what he found on the ground. I think there is no error in this ruling and direction of the court.

The witness had run certain lines, at the request of the plaintiff, and according to a paper containing a diagram, which the plaintiff placed in his hands. The fact that such lines were run was a link in the chain of the plaintiff's evidence. Whether they were lines



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of the patent under which he claimed depended upon a comparison with the patent which was before the jury, and the evidence of the surveyor as to the appearances upon the ground, &c. There was no objection to the fact as irrelevant evidence, but only to the use made of the paper, on the ground that not having been written by the witness, and he not recollecting what course or distance he had run independently of the said paper, it could not be referred to by him to refresh his memory. It was an original paper, was in court, was identified by the witness, and, in connection with his testimony, was the very best evidence of the lines he had been requested by the plaintiff to run. The witness might have recollected the courses and distances of these lines; and if so, might have given evidence of them, without reference to the paper. But it could hardly be expected, after the lapse of several years, that he could remember them without such reference, or even with it. All that he could reasonably be expected to be able to say was, that, at the plaintiff's request, he ran certain courses and distances, set forth in the paper which he had in court, and held in his hand. This he did say, and it was admissible evidence to prove the fact accordingly. In this and the like cases, the paper itself, being a part of the evidence, must be produced.

The other paper to which the witness was permitted to refer was an extract or copy from his field notes of the survey before mentioned, which notes were at his home. He said that the copy was accurately made by him, but did not pretend to say that he recollected the courses or distances deposed to from said copy, independently thereof. The defendant objected to the evidence, because the original field notes were not produced. The court overruled the objection, and permitted the witness to refer to the copy *to refresh his recollection* of the running done by him. If the wit-

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ness, after referring to the copy, had said that he had no recollection of the facts therein contained, and could only say they were true because they were therein contained, I think, according to the authorities before cited, it would have been necessary to have produced the original. There may be some ambiguity on this subject in the bill of exceptions, which might produce some difficulty, if the question were material; but in this case it is not. Understanding the court as permitting the witness to refer to the paper merely to refresh his recollection of the running done by him, or of the facts therein set forth, I think there was no error in so doing.

In regard to the objection that the court permitted the witness Fisher to be sworn on the *voir dire* after his interest had been shown by evidence *aliunde*: It is sufficient to say that the error of the court, if any, was cured by the fact, that before the witness was sworn in chief, a deed was produced and proved, which terminated his interest.

In regard to the instructions: I think the court did not err in refusing to give those which were asked for by the parties, or in giving those which were given by the court. The agreement of the parties, which was by deed exhibited and proved to the jury, if it did not terminate the defendant's right to hold the land in controversy on the 10th of April 1847, at least made him a tenant at will or at sufferance after that day; and such a tenant is not entitled to six months' notice, to which a tenant from year to year is entitled. The most that he can require is reasonable notice, and he is entitled to no notice if he claims to hold adversely, or attorns to some other person, or does some other act disclaiming to hold as tenant. 1 Lom. Dig. 165. In this case there was evidence that the defendant refused to surrender possession of the land to Fisher according to the agreement. I think that the plaintiff,

being invested with the legal title, had a right to maintain the action at the time it was instituted, notwithstanding his executory contract with Fisher.

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In regard to the only remaining question: I think the court erred in excluding the evidence of the witness Alexander Harrison, offered by the defendant. In a suit brought upon a deed, the plaintiff is not required to prove it without a plea of *non est factum*, verified by oath. But when, as in this case, a deed is introduced collaterally as evidence, it must be proved by the party introducing it, according to the rules of law; and the other party, without any denial of the deed on oath, may assail it by any evidence which shows, or tends to show, that it is not his deed; indeed, by any evidence which would be admissible on the plea of *non est factum*. He may, therefore, introduce evidence tending to show that there was fraud in the execution of the instrument, as that it was misread to him, or his signature obtained to a different instrument from the one he intended to sign. *Taylor v. King*, 6 Munf. 358; *Dorr v. Munsel*, 13 John. R. 430; *Van Valkenburgh v. Rouk*, 12 Id. 337.

In the last case the court said: "If a deed be misread or misexpounded to an unlettered man, this may be shown on *non est factum*, because he has never assented to the contract. So, if a man be imposed upon, and signs one paper while he believes he is signing another, he cannot be said to have assented, and may show this on *non est factum*." It does not certainly appear whether the defendant in this case was unlettered or not. His signature to the deed purports to have been made by himself, and the presumption therefore is that he was not. But the admissibility of evidence tending to prove fraud in the execution of an instrument does not depend upon the fact that the party whose deed it purports to be was unlettered, though the weight of the evidence is materially increased thereby.

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In this case, the defendant offered to prove by one of the subscribing witnesses to the bond, that he and the defendant both understood the agreement (which is in the handwriting of the plaintiff) as referring the *title* to the land to the arbitrators named in said paper; that said witness was present when it was read to the defendant, and neither the witness nor the defendant understood or believed that said paper made the defendant the tenant of the plaintiff, nor did they know that any such thing was in said paper; and further, that both the witness and the defendant understood said paper, as read to them, as simply referring to the arbitrators the right to said land, and not that the defendant had by that paper given up his right to the land, and referred to arbitrators his right to pay for improvements, to be set off against the annual rents of said land. If the paper was correctly read to the defendant at the time of its execution, his misunderstanding of it could not affect its validity as a deed: And so far as the evidence offered tends to show a mere misunderstanding of the paper, it is wholly immaterial and irrelevant to the issue. But if it tends, in any degree, however slightly, to show that the paper was materially misread to the defendant at the time of its execution, and that he was thus induced to execute it, the evidence is admissible. I think it has such tendency, and ought to have gone to the jury, to be weighed by them with the other evidence in the case. It may be of little weight in itself to prove fraud in the execution of the paper, and of less or none when taken in connection with the other evidence. But of that the jury are the exclusive judges. The witness was selected by the parties to attest the instrument; and it was his duty to notice the circumstances attending its execution. He did not say that the paper was misread, nor how it was read to the defendant at the time of its execution. He may not have remembered particulars, or been able to state

more than his understanding of the substance of the paper as read to the defendant. That understanding was materially different from the plain meaning of the paper itself; and it is difficult to conceive that he could have so understood it, if he is a man of ordinary intelligence, and heard the paper correctly read. But these are matters for the consideration of the jury, and are adverted to here only to show that at least the evidence is relevant and admissible; which is the only question the court has to decide in regard to it.

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I am of opinion that the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

LEE and SAMUELS, *Js.* concurred in the opinion of *Moncure, J.*

DANIEL, *J.* dissented.

JUDGMENT REVERSED.

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JOHNSTON v. ZANE's trustees & als.

(Absent *Daniel, J.*)

August 26th.

1. To avoid a deed at the suit of a subsequent creditor, actual fraud must be shown.
2. A deed which provides in the first place amply for all the then existing debts of the grantor, and then settles the balance of the property on the grantor's family, in the absence of actual fraud, is a valid deed.
3. A settlement which gives to the grantor a bare maintenance with his wife, for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after contracted debts.
4. What provisions in a deed will not avoid it.
5. *QUERE*: If a subsequent creditor can file a bill to set aside a deed on the ground that it is voluntary, and therefore void as to prior creditors, no prior creditor complaining of it.
6. Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue, but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*, and the plaintiff must prove his case as to both.
7. A note does not import a debt existing previous to the period of its execution; but its effect is to give the debt and the note a contemporaneous origin.

In March 1848 James C. Johnston filed his bill in the Circuit court of Ohio county against Jacob S. and William W. Shriver, trustees of Platoff Zane and Eliza Jane, his wife, and their children, and others, in which he alleged that Platoff Zane, of Wheeling, in his life time, being indebted to A. J. Prentiss in the sum of one thousand two hundred and seventy-five dollars, on the 9th of March 1837, at Wheeling, executed to him his note, payable on demand, for that sum. That at

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the urgent request of said Zane, who was the brother of plaintiff's wife, the plaintiff bought the note; and that in October 1841 he recovered a judgment thereon against Platoff Zane.

He alleged further, that two days before the said note was made Zane executed two deeds of trust to Charles D. Knox and Samuel Sprigg, copies of which he exhibited with his bill, by one of which he conveyed a part of his property, with the professed purpose of securing the payment of his debts; and by the other he conveyed all the residue of his property in trust for himself and his wife. These conveyances the plaintiff charged were made to delay, hinder and obstruct his creditors in the collection of their just debts. He insisted that his judgment was a lien on the lands conveyed in said deeds; that Platoff Zane retained an interest in said lands; which ought to be subjected to the payment of the plaintiff's debt. He stated the death of Sprigg, and the substitution of the Shriver as trustees in the place of Knox; and that there was a large amount of the trust property in the hands of the trustees, much more than sufficient to pay his debt; and he prays that they may be subjected for that purpose, and for general relief.

The children of Platoff Zane, all of whom were infants, answered by a guardian *ad litem*; and the bill was taken for confessed as to Mrs. Zane. The acting trustee, William W. Shriver, answered. He said that he could not admit or deny the existence of the note spoken of in the bill, as a valid debt of Platoff Zane, he having no personal knowledge of its existence, nor of the consideration for which it was given. Nor could he admit or deny that the plaintiff bought the note at the urgent request of Platoff Zane, he having no knowledge on the subject; and he called for full proof of the same.

The defendant admits the judgment and the execu-

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tion of the deeds, and the substitution of himself and Jacob S. Shriver as trustees; but he denies that they were intended to delay, hinder or defraud his creditors; on the contrary, they were intended in good faith to provide for and secure the payment of all his just debts as then existing, and to provide for and secure a comfortable support for himself and wife and children out of the residue of his estate after the payment of all his just debts then existing, and to protect such as remained of his estate from his own improvident and reckless waste. That Noah Zane, the father of Platoff Zane, died in 1833, leaving to said Platoff, then a minor, a large estate. That Platoff Zane attained to the age of twenty-one years in February 1836, when he took possession of his estate, and between that time and the making of said deeds, a period little over a year, he contracted debts and liabilities to the amount of between fifty and seventy thousand dollars. His friends, seeing this reckless waste of his estate, and foreseeing that unless it was secured beyond his control in a very little time the whole would be squandered, and himself and his family reduced to want or dependence, procured him to execute the said two deeds of trust, for the purpose, first, of paying all his and his wife's debts then existing; and second, to provide for himself and his wife and family. He insisted that the deeds were valid against all subsequent creditors of Platoff Zane; and that no such creditor could claim from said trust subject any interest beyond what was reserved to said Platoff Zane out of the rents and profits, after the support of himself and wife and children: and he alleged that more than the whole rents and profits were so expended during the life of Platoff Zane, and upon his wife and children since his death.

The deeds which were assailed by the plaintiff are dated the 6th day of March 1837; they were acknow-

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ledged by Platoff Zane and his wife before two justices on the next day; and were admitted to record, one on the 7th, and the other, to secure creditors, on the 11th of the same month. The deed to secure creditors does not set out any specific debt due from the grantors, but recites that whereas the said Platoff Zane is largely indebted to sundry persons, and is desirous to provide a fund for the payment thereof; and then proceeds to convey a large amount of property, principally real estate; the personal property was his interest in the store and store concern kept in Wheeling by Zane & Pentoney, which had been bequeathed to him by his father, Noah Zane. The trustees were authorized to proceed to sell the real estate, and reduce to money the interest of Platoff Zane in the said store; and, in selling the real estate, they were authorized to sell for cash or on a credit, and divide the lots or sell each as a whole, as they might think would best promote the interest of the fund. The trustees were to have immediate possession of the property, and to take the rents and profits until a sale, and these rents and profits were to be applied to the payment of debts and other objects and purposes contemplated by the deed. In collecting debts, the trustees were authorized to compound or compromise doubtful or disputed claims, if they thought it judicious. And it was further provided that the trustees should pay no debt, before a judgment, to which Platoff Zane objected; nor should they be bound to pay a debt until after judgment which they might think Platoff Zane was not legally bound to pay; but if he should request a debt to be paid, and the trustees paid it, the payment thereof was not afterwards to be questioned. The trustees were to be allowed a fair and liberal compensation for their services, and to be authorized to employ, at the cost of the trust fund, agents, servants and clerks; they being responsible for the acts of the

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same; but in such case, the compensation was to be no more than what was reasonable, considering the employment of such agents, &c. And after all the debts then due of Platoff Zane and his wife, and all charges and expenses of the trust were paid, the moneys arising from the sale of the real property aforesaid, and from the said store concern, were to be applied, first, in purchasing a residence for Platoff Zane and his wife, and the balance was to be invested in bank stock or other good securities; and the residence was to be occupied by Zane and wife for their lives and the life of the survivor, and the interest and profits arising from the stocks and other securities were to be received by the trustees, and applied to the support of Zane and his wife during their lives and the life of the survivor of them. And it was further provided that if Platoff Zane should have children or descendants, in life at the death of the survivor of him and his wife, that said residence, stocks and securities should then go to them, the descendants taking *per stirpes*; and if there were no such children or descendants, then to his right heirs. But a power of appointment among his children was reserved to Platoff Zane.

The other deed conveyed to the same trustees other real estate, a part of which was the property of Mrs. Zane. The trustees were to manage the property, rent it out, and receive the rents. The said rents and profits were not to be assigned or transferred by either Zane or his wife, and were not to be liable for any debt which either of them might contract. The trusts were in favor of Platoff Zane and wife, and the survivor of them, for their lives, except of so much of the property as belonged to Mrs. Zane, of which the trusts were for her separate use, and then for the children and descendants of Platoff Zane; and on failure of children, to his right heirs; with a power of appoint-

ment in him among his children; substantially the same in all these respects as were the trusts of the other deed.

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It is stated in the answer of the trustee Shriver that Platoff Zane died in May 1846, leaving his wife surviving him, and leaving six infant children. There was no parol testimony; and the cause came on to be heard upon the pleadings and the documentary evidence, consisting of copies of the plaintiff's note and judgment and the two deeds of trust; when the court below dismissed the bill with costs. From this decree the plaintiff obtained an appeal to this court.

Bibb and Baxter, for the appellant.

Fry, for the appellees.

LEE, *J.* Three grounds have been assigned by the appellant's counsel, upon some one of which it is insisted he is entitled to the relief sought by his bill. These are:

First, that the deeds of the 7th of March 1837 are fraudulent and void as to the creditors of Platoff Zane, and that the appellant is entitled to impeach them as such, whether he is to be regarded as a prior or subsequent creditor, in reference to the time of their execution.

Secondly, that in point of fact his debt was a pre-existing debt, and is, therefore, in terms provided for by the deeds.

Thirdly, that under the provisions of said deeds Platoff Zane took such an interest in the subject thereby conveyed as would be liable to subsequent creditors, and that the appellant is entitled as such to subject the same to satisfaction of his debt.

As to the first ground: Nothing is better settled than that a voluntary conveyance, which interferes with or breaks in upon the rights of existing creditors,

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will not be permitted to take effect to the prejudice of their just demands: and this, according to many of the cases, without regard to the amount of the debts, or the extent of the property settled, or the circumstances of the party. *Fitzer v. Fitzer*, 2 Atk. R. 511; *Taylor v. Jones*, 2 Atk. R. 600; *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 690, 714; *Reade v. Livingston*, 3 John. Ch. R. 481; *Thomson v. Daugherty*, 12 Serg. & Rawle 448; *Howe v. Ward*, 4 Greenl. R. 195; *Hopkirk v. Randolph*, 2 Brock. R. 132; *Backhouse v. Jett*, 1 Brock. R. 500, 511; *Ridgway v. Underwood*, 4 Wash. C. C. R. 67; *Jackson v. Seward*, 5 Cow. R. 67; *O'Daniel v. Crawford*, 4 Dev. Law R. 197.

On the other hand, numerous cases are to be found which, in effect, maintain the doctrine that a conveyance, although voluntary, may be good, under circumstances, even as against existing creditors; and that a party's being indebted at the time is but an argument of fraud, the question still being, in every case, whether the conveyance is a *bona fide* transaction, or a mere device to delude and defeat creditors. *Cadogan v. Kennett*, Cowp. R. 432; *Doe v. Routledge*, Ibid. 705; *Richardson v. Smallwood*, 1 Jac. R. 552, 4 Cond. Eng. Ch. R. 202; *Gale v. Williamson*, 8 Mees. & Welsb. 405; *Verplank v. Sterry*, 12 John. R. 536; *Wickes v. Clarke*, 8 Paige's R. 161; *Seward v. Jackson*, 8 Cow. R. 406; *Hinde's lessee v. Longworth*, 11 Wheat. R. 199.

The subject is one involving the enquiry into the relations which the two great classes of creditors, prior and subsequent, occupy in relation to a voluntary settlement. And the question is, whether they occupy a common ground, so that a conveyance which would be adjudged fraudulent as to the former would also be held to be fraudulent as to the latter; or will a discrimination be made, the effect of which will be to withdraw from enquiry, in the case of a prior creditor, the various circumstances attending the execution of

the conveyance, such as the nature of the consideration, the value of the property settled compared with that, if any, retained, the extent of the indebtedness, &c., &c.; all of which are, in the case of a subsequent creditor, most proper to be considered, and upon which, in order to succeed, he must be able to fix the imputation of fraud in the absence of direct and positive proof of the intent. Chancellor Kent clearly recognizes a distinction between the two classes. In the case of the prior creditor, he considers that any enquiry into the amount of debts existing at the time would be embarrassing, if not dangerous; and he regards it as wholly unnecessary, considering the debtor as absolutely disabled from making any voluntary settlement to the prejudice of any existing debts; and such, he says, is the clear and uniform doctrine of the cases. *Reade v. Livingston*, 3 John. Ch. R. 481, 500. Judge Story, on the other hand, evidently considers him as carrying the doctrine too far. He thinks that mere indebtedness would not, *per se*, avoid a voluntary conveyance, even as to subsisting creditors, unless the other circumstances are such as justly to create a presumption of fraud. 1 Story's Eq. Jur. § 360 to 365, inclusive. The opinion of Chancellor Kent is supported by that of Mr. Atherley, in his work on Marriage Settlements, at p. 212; and numerous authorities are cited, which he regards as fully sustaining it. In support of his views, Judge Story refers to many cases which he regards as necessarily tending to maintain them; which will be found in the notes to the sections above cited.

The question has been the subject of a most animated and elaborate discussion between two of the former judges of this court in the cases of *Hutchison v. Kelly*, 1 Rob. R. 123; *Bank of Alexandria v. Patton*, Ibid. 499; and *Hunters v. Waite*, 3 Gratt. 26. Judge Baldwin strenuously combats the opinion of Chancellor Kent.

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He maintains that prior and subsequent creditors stand upon common ground; and that although indebtedness at the time of a voluntary settlement may create a legal presumption against its validity, yet such presumption is only *prima facie*, and not conclusive, depending upon the particular circumstances of the case. Judge Stanard takes the opposite ground. He maintains the correctness of Chancellor Kent's opinion, and argues that prior and subsequent creditors stand upon different grounds; that their rights have different degrees of merit, and that a voluntary settlement might well be held invalid and ineffectual as against the claims of existing creditors, which would be entirely impregnable to any assault made by a subsequent creditor. The subject is most fully explored in the opinions of these eminent jurists, and the whole store of argument and authority that might be brought to bear upon it well nigh exhausted. But while I have formed for myself an opinion on the point, I yet deem it one not material to be decided in this cause. I understand both these judges as agreeing that, in the case of a subsequent creditor, a settlement cannot be impeached on the mere ground of its being voluntary, if there be no actual fraudulent view or intent at the time it is made. To let in such a creditor, it must be shown that there was *mala fides* or fraud in fact in the transaction. And if this be shown, whether the actual fraudulent intent relate to existing creditors or (as it may) be directed exclusively against subsequent creditors, the effect is the same, and the subsequent creditor may, upon the strength of it, successfully impeach the conveyance. Such is, I think, the clear result of all the authorities. *Stileman v. Ashdown*, 2 Atk. R. 477; *Walker v. Burrows*, 1 Atk. R. 93; *Russell v. Hammond*, 1 Atk. R. 12; *White v. Sansom*, 3 Atk. R. 410; *Kidney v. Coussmaker*, 12 Ves. R. 136; *Holloway v. Millard*, 1 Madd. R. 414; *Shaw v. Standish*, 2 Vern. R. 326;

Richardson v. Smallwood, 1 Jacob's R. 552, 4 Cond. Eng. Ch. R. 262; *Sexton v. Wheaton*, 2 Wheat. R. 229, 246; *Hinde's lessee v. Longworth*, 11 Wheat. R. 199; *Reade v. Livingston*, *ubi supra*; *Hutchison v. Kelly*, *ubi supra*; *Hunters v. Waite*, *ubi supra*; *Bennett v. Bedford Bank*, 11 Mass. R. 421; *Salmon v. Bennett*, 1 Conn. R. 525.

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But though fraud in fact must thus be shown, it is not required that the actual or express intent be shown by direct proof. This would be unattainable in many cases, and, if it cannot be given, it may be supplied by just legal implication from the evidence where the circumstances are such, or such marks or badges of fraud are present, that the vicious intent may and must be inferred. *Lord Townsend v. Windham*, 2 Ves. sen. 1; *per Baldwin, J.*, in *Hutchison v. Kelly*, 1 Rob. R. 123, 134; and *per Stanard, J.*, in *Hunters v. Waite*, 3 Gratt. 26, 72.

Where the grantor is not indebted at the time of making a voluntary conveyance, no fraudulent intent can of course be shown as against existing creditors; and yet it might be thoroughly vicious because prompted by a fraudulent purpose aimed at such as might become creditors thereafter. If the grantor, however, be indebted at the time, but due provision be made for all existing debts, it is clear that all just imputation of fraud in respect of them is out of the question. In *Stephen v. Olive*, 2 Bro. C. C. 90, a settlement had been made in favor of a wife and child, by a party who was indebted at the time in about the sum of five hundred pounds, but the debt was amply secured by a mortgage on all the estate embraced by the settlement. The master of the rolls maintained the validity of the settlement; thus, in effect, placing a settlement made by a party indebted at the time, but whose indebtedness was duly provided for, upon the same footing as one made by a party not indebted

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at all. In *George v. Milbanke*, 9 Ves. R. 189, 194, Lord Chancellor Eldon clearly recognizes this as the modern doctrine. He says that a provision in a voluntary settlement for payment of existing debts would make such a settlement good against all future creditors. In *Reade v. Livingston*, 3 John. Ch. R. 481, 501, Chancellor Kent says the presumption of fraud as to subsequent creditors, arising from the circumstance that the party was indebted at the time of the settlement, is repelled by the fact of those debts being secured by a mortgage or by a provision in the settlement. And in the case of *Hester v. Wilkinson*, 6 Humph. R. 218, this doctrine was carried still further. That was a case of a voluntary settlement on a wife and children, by a party indebted at the time, and the deed contained no provision for the payment of the debts, nor was there any mortgage or other security given by which they were provided; but the trustee admitted that it was the understanding and agreement of the parties that he should pay all existing debts by the sale of so much of the property as might be necessary for that purpose. The court held this to be sufficient, and declared that a voluntary settlement on a wife and children, if fair at the time, will be good against subsequent creditors of the party making it.

I think, therefore, that the case of a voluntary settlement upon a wife and children, although by a party indebted at the time, will, according to most approved authorities, stand on the same footing with such a settlement by a party not indebted, provided due and ample provision be made for the payment of such subsisting debts; and that, in either case, to assail such a settlement successfully, an actual fraudulent intent must be manifested, or must be collected from the circumstances of the case. Now it would seem at most a solecism to say of a conveyance, a primary object of which is to secure all existing debts, and for

which full provision is made, that it is fraudulent as to the creditors existing at the time. I agree, however, that a conveyance might purport to secure all existing debts, and yet, by reason of terms and stipulations which it contained, intended or serving to hinder, embarrass or delay the creditors in the receipt of their respective debts, it might be held to be fraudulent and void as to them. But there is nothing of that kind in this case. The deeds contain no terms or stipulations which are unusual or unreasonable. Their provisions are such as might well be called for by the character of the subjects conveyed, the nature and amount of the heavy debts which it secured, and the circumstances under which they were contracted, the situation of the grantor and the condition of his family at the time they were executed. There is no such arbitrary power reserved to Platoff Zane to direct the management of the trust subject as is supposed by the counsel. He was not authorized to require any debt to be paid before judgment, nor were the trustees forbidden to pay any other debts than such as he might direct to be paid, before judgments were rendered upon them. This is an entire misapprehension of the true meaning of the provision alluded to, but it is not difficult to understand it. The debts to be provided for were numerous and heavy, amounting, as it would seem, to a sum between fifty and seventy thousand dollars, and all contracted by an indiscreet, inexperienced and extravagant young man, within a period of a little over one year after the attained his majority. Many or some of these debts might be such as from an utter want of consideration, or because contracted under the influence of fraud or imposition, or for some other cause, he might not feel himself bound or willing to pay. Hence it was provided that if he objected to the payment of any debt claimed, the trustees, against his will, should not pay it

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till a judgment was recovered upon it. And though he might direct a debt to be paid, yet if the trustees thought it was one which he was not legally bound to pay, they were not bound to pay until a judgment should be recovered upon it; though if he requested a debt to be paid, and the trustees did pay it, the payment was not to be afterwards called in question; meaning, of course, by Zane or those claiming under the settlement, the fund being confessedly more than adequate to the payment of all the debts. To these provisions no just exception can be taken: they were obviously intended to protect the trust subject against unfounded pretensions, and at the same time to give a reasonable assurance to the trustees of exemption from personal liability for the acts done by them in discharge of the trust.

As to the matters relied on as badges of fraud, they are either inapplicable or without significance. That the grantor was largely indebted and the conveyance one of his whole estate, and that the creditors were hindered from their ordinary remedies by judgment and execution, would only be of force where no provision, or an inadequate one, is made for the payment of the debts. Here it is full and ample, and no creditor provided for is complaining. That the deeds were voluntary, and by one largely indebted, is a point I have already fully considered. That neither of the trustees was a creditor, that the consideration named was the inadequate and indeed nominal one of five dollars, and that the creditors are not named and were not consulted nor consenting to the terms of the deeds at the time of their execution, are matters which, under the circumstances of this case, cannot be entitled to the slightest weight. Nor is the absence of any antenuptial agreement for a settlement a circumstance that will affect the validity of the settlement made, if it be otherwise free from objection. This is

sufficiently apparent from the cases already cited for other purposes; to which numerous others to the same effect might be added.

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In what has been just said it has been assumed that a subsequent creditor may come with a fishing bill charging indebtedness to others at the time of the settlement, and, upon proving the same, obtain relief directly against the subject. Yet this would seem for a long period not to have been a settled point. Chancellor Kent expresses the opinion that he will be entertained, and that his rights will not depend on the mere pleasure of the prior creditors whether they will or will not impeach the prior settlement. *Reade v. Livingston*, 3 John. Ch. R. 481. And such Judge Baldwin seems to think is the fair conclusion from the current of decisions. *Hutchison v. Kelly*, 1 Rob. R. 123. Sir William Grant was of a different opinion in *Kidney v. Coussmaker*, 12 Ves. R. 136; and the opinion of Lord Rosslyn, referred to by him, in the case of *Montague v. Lord Sandwich*, is adopted as the precedent which he professes to follow. In *Lush v. Wilkinson*, 5 Ves. R. 384, a bill of this kind was dismissed; the master of the rolls (Lord Alvanley) saying, "it is very extraordinary for a subsequent creditor to come with a fishing bill in order to prove antecedent debts." He, however, gave the party liberty to file another bill. Of this case Sir William Grant remarked, in *Kidney v. Coussmaker*, 12 Ves. R. 136, 155, that the only surprise he felt at Lord Alvanley's decree was, that his lordship did not dismiss the bill absolutely, without giving leave to file another. And, indeed, in a recent case decided in 1843, the vice chancellor remarked that a deed (of voluntary settlement) can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time; though, when it shall have been set aside, subsequent creditors may be let in. *Ede v. Knowles*, 2 Younge & Collyer 177, 21 Eng. Ch. R. 177.

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In Virginia, according to the opinions of Judges Stanard and Baldwin, it would seem that subsequent creditors will be let in upon a fund fraudulently alienated wherever the conveyance has been or might be successfully assailed upon the ground of actual fraud by prior creditors. *Hutchison v. Kelly*, 1 Rob. R. 123; *Bank of Alexandria v. Patton*, Ibid. 499.

There is certainly no proof in this case of any actual or express fraudulent intent on the part of Platoff Zane in executing these deeds. Nor is such intent to be fairly deduced from the circumstances of the transaction. The provision for all existing creditors, ample and complete as it is, puts an end to all question so far as they are involved. The consideration of the settlement upon his wife and children, arising out of the natural duty to provide for their support, is one of the most meritorious character, entitled to the respect and support of the court of chancery, rather than to its frown and reprehension; and especially so, when we see the utterly improvident and wasteful habits of the grantor, and that their ruinous consequences to himself and his family were already beginning to cast their shadow before. Under the circumstances, there was nothing unreasonable in the settlement. On the contrary, it was perhaps the most judicious and prudent measure which he consummated during his brief but eventful career, after he attained his majority. Possession of the property was not reserved to nor retained by him. He did not continue to exercise acts of ownership over it, nor was he entitled to receive the rents or otherwise enjoy the proceeds. In short, not one of the usual marks or badges of fraud appears to be present. The only circumstance which can with any plausibility be relied on as evincive of a fraudulent intent, is the fact that the debt to the assignor of the appellant was contracted so shortly after the execution of the deeds. It is true this may be looked to as evidence of the intent

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of the party at the time. *Walker v. Burrows*, 1 Atk. R. 93. It is, however, but a circumstance to be considered in connection with all the others surrounding the transaction; nor do I understand Lord Hardwicke as intending anything more by the remarks made by him in the case just cited. So viewed, I regard it as insufficient to bring home the evil intent which will stamp the transaction with the character of meditated fraud. No attempt to deceive is manifested; no suggestion of falsehood or suppression of truth. The deeds were duly admitted to record upon the same day on which they were executed. Such notice as the public records can furnish was thus given to the world. The note was executed in Wheeling, where Platoff Zane with his family and the trustees all resided, and where the deeds were recorded. The appellant was the brother in law of Platoff Zane, and it must be presumed was fully aware of all that had taken place. The bill does not aver ignorance of the existence of the deeds on the part of Prentiss when he took the note, nor on the part of the appellant when he bought it of him. Considering the wild, extravagant and improvident habits of Platoff Zane, as evinced by the history of the preceding thirteen months, his giving a note for one thousand two hundred and seventy-five dollars two days after the execution of the deeds, or upon any day, could excite neither surprise nor suspicion. It might have been for a good or a bad consideration, and upon a transaction wholly originating after the execution of the deeds.

In every view, I think the attempt of the appellant to assail these deeds on the ground of fraudulent intent, either as it respects existing creditors, or those who might thereafter become such, must be held to be ineffectual.

We come now to the second ground assumed, that

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the note of Zane to Prentiss was for a pre-existing debt; and that it may, therefore, be regarded as provided for by the terms of the deeds. But the bill contains no such allegation. It does not set out the consideration or the origin of the note. It simply avers that Zane, being indebted to Prentiss in the sum of one thousand two hundred and seventy-five dollars, on the 9th of March 1837 executed his note for the payment of the same. This is but the usual and formal mode of stating the execution of a note in pleading. It is not understood to import the existence of the debt at a previous period, but only at the time of, and just before, the execution of the note. Its effect is to give the note and the debt which it evidences a contemporaneous origin. But if a prior existence of the debt had been formally alleged, the answer of Shriver, the trustee, sufficiently puts it in issue to require the appellant to support it by proof. He says that he can neither admit nor deny the existence of the note, having no personal knowledge of it or of the consideration for which it was given, but calls for full proof touching the same. No proof whatever is furnished as to the origin or the consideration of the note. If it were for a pre-existing debt, that fact and the commencement of the debt might have been shown in evidence; and in the absence of any such proof, I think it clear that the origin of the debt must be referred to the date of the note.

It is said, though, that Mrs. Zane has not answered, and the allegations of the bill are, as to her, to be taken for confessed, and that therefore, the pre-existence of the debt being admitted, the appellant is entitled to relief to the extent of any interest she may have in the subject. I have, however, already shown that there is no such allegation in the bill: and if there had been, the answer of Shriver, the trustee, would serve to put it in issue for her benefit, and that of all

others claiming under the deeds. For this purpose he may properly be regarded as representing the *cestuis que trust*, and his answer will enure alike to the benefit of all.

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The last ground upon which the pretensions of the appellant have been rested is, that under the provisions of the deeds Platoff Zane took such an interest and property in the subject conveyed as may and should be subjected to satisfaction of such debts as he might afterwards contract. The extent of the interest secured to Platoff Zane was the right to occupy, jointly and in common with his wife and family, the residence and homestead to be purchased by the trustees for their benefit out of the trust funds, after satisfaction of the debts, and to a support and maintenance during his life, with a power of appointment to such of his children or descendants, and in such proportions, as he might name; the fund to go, in default of such appointment, to his children or descendants, and, failing them, to his right heirs. His interest is for a bare maintenance, and continues during his life only. Beyond his own support, he can claim nothing from the fund. If the profits were more than adequate to the necessary wants of the whole family, including himself, and a surplus accrued for investment, he would be entitled to no benefit from it whatever. Upon his death every vestige of interest which he could be said to have in the subject would absolutely cease and determine, and there would be nothing which could be made the subject of pursuit by a creditor. The bill here was not filed until after the death of Platoff Zane; and this is a sufficient answer upon this point. Were he in full life, however, a not less sufficient answer to the pretension could be readily given. The interest of Platoff Zane under the deeds imports no such notion of property as involves a liability to his debts. This would violate the plain intention and provisions

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of the deeds, and would utterly disregard the exigencies of the occasion which led to their execution. Their purpose was to arrest a thoughtless, inexperienced and prodigal young man in the headlong career of extravagance and folly to which he would seem to have committed himself, the disastrous results of which to himself and his wife and children could be too readily foreseen by his friends. They induce him to make these deeds, conveying away his whole estate, making full provision for all his then existing debts, but intentionally and formally disabling him from in any manner charging the property thus conveyed with any debts thereafter to be contracted. This he had a right to do, no creditors existing at the time being in any way injured, and no fraudulent intent being fairly to be imputed to the transaction. 1 Story's Eq. Jur. § 356, and authorities cited in the note; *Markham v. Guerrant*, 4 Leigh 279. And although a support is reserved to him in common with his wife and children, out of the surplus, after paying all subsisting debts, yet it is a leading idea of the deeds that the entire subject is to be preserved by the trustees free from the control of the *cestuis que trust*, or any of them, and exempt from liability for any debts they might thereafter contract; and thus all idea of a property in Plattoff Zane in the subject is utterly excluded by the very terms of the deeds. The interest which he possessed, such as it was, by virtue of his right to a subsistence out of the fund, in common with his wife and children, and joint and inseparable from theirs, is not such a property as can be reached in any form by his creditors. The case is fully within the principles of several cases which have been decided in this court, and which may be regarded as settling the law upon the subject. *Scott v. Gibbon*, 5 Munf. 86; *Markham v. Guerrant*, 4 Leigh 279; *Roanes v. Archer*, Ibid. 550; *Perkins v. Dickenson*, 3 Gratt. 335. The case of *Mark-*

ham v. Guerrant will be found to be marked by circumstances very similar to those we find in the case under consideration.

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Upon none of the grounds assigned do I think the pretensions of the appellant can be maintained; and I am of opinion to affirm the decree.

The other judges concurred in the opinion of *Lee, J.*

DECREE AFFIRMED.

Lewisburg.**LEVASSER v. WASHBURN.**

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August 29th.

1. Time does not run against the commonwealth.
2. Though an adversary possession of land had commenced to run against the true owner, yet upon the forfeiture of the land to the commonwealth, under the delinquent land laws, the possession, until the land is sold by the commonwealth, is no longer adversary against her, or her grantee claiming under a conveyance from a commissioner of delinquent lands.
3. The forfeiture of land for the failure to enter it upon the commissioner's books and pay the taxes and damages due upon it was effected by the statute, and required no judicial proceeding to complete it. The forfeiture was, therefore, complete at the time fixed by the statute.
4. The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing the commonwealth's right to forfeited lands to a junior patentee in possession, only applies to those whose patents bear date previous to the 1st of April 1841.
5. A patent for land which had been previously granted by the commonwealth, and had been forfeited under the delinquent land laws, passed nothing to the patentee; and a conveyance of the land forfeited by the commissioner of delinquent lands passed the title vested in the commonwealth by the forfeiture.
6. The court may refuse to give an instruction because it is so obscurely expressed as to leave in doubt the meaning intended.

This was an ejectment in the Circuit court of Jackson county. The declaration contained one count on the demise of Honore Girond, another of the president and directors of the literary fund, a third of J. E. Norvell and John De Homergue, a fourth of said Norvell and Eugene Levasser, and a fifth in the name of Eugene Levasser alone. The plaintiff, under the last mentioned count, claimed as derivative purchaser under a sale made by order of the Circuit court of Jackson county, under the acts of assembly in relation to delinquent and forfeited lands. A grant had issued to

one Honore Girond, bearing date on the 22d of March 1786, for ten thousand eight hundred and forty-three and three-quarter acres; and the land thus granted having become forfeited to the commonwealth by reason of the failure of the owners to cause the same to be entered upon the books of the commissioners of the revenue in the proper county, and to be charged with taxes and damages, and to pay the same according to law, the same was reported to the court, and on the 13th of September 1841 a decree was entered, directing the land to be sold by the commissioner. The sale took place on the 4th Monday in November 1841, and was confirmed by the court on the 15th of April 1842. A deed was executed to the purchaser, in pursuance of such confirmation, on the 25th of December 1843. The declaration in ejectment was filed on the 10th of April 1847; and on the same day the defendant appeared and pleaded the general issue. The defendant, Thomas Washburn, claimed under a patent to himself for one hundred acres of land, bearing date the 1st day of April 1841, and under a written contract which he had made for the purchase of four hundred and eighty acres of land, embracing the premises in controversy, of one James Hector, in the spring of 1836. This contract was proven to have been lost, and evidence was given of its contents. He also proved that he went upon the land in the spring of 1836, claiming title to the same, and had continued in possession down to the institution of the suit. He also proved that one Smith had settled upon the land in 1833, had held it until he took possession in 1836, claiming under one Watson, who claimed under a grant founded on an inclusive survey which issued to one Samuel M. Hopkins on the 1st of July 1796; but he gave no evidence of any connection between his claim and that of Smith.

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The grant to Girond, and the proceedings of the Circuit court of Jackson county in the matter of the

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forfeiture for nonentry and nonpayment of taxes, the deed from the commissioner to De Homergue, the purchaser, and a conveyance from him to Levasser, one of the lessors of the plaintiff, were given in evidence to the jury. A plat and report made in the cause under the order of the court were also exhibited, and it appeared that the land claimed by the defendant lay within the boundaries of the tract claimed by the plaintiff.

The defendant gave in evidence the grant to Hopkins in 1796, and a conveyance from one Oliver Walcott to the said Watson, dated 22d June 1808.

After the evidence had been closed on both sides the plaintiff moved the court to exclude the defendant's grant from the jury; but the motion was overruled. He then asked the court to instruct the jury :

First. That the decree of the court of Jackson was conclusive as to the forfeiture of the land and the quantity forfeited; and that it was not competent for the defendant to contradict it by alleging that the land embraced by his grant for one hundred acres was not forfeited.

Secondly. That if said one hundred acres had been before granted by the commonwealth to Girond, the grant to defendant passed nothing.

Thirdly. That the statute of limitations did not run against the state, and that it only commenced running against the plaintiff on the purchase at the commissioner's sale in the fall of 1841.

Fourthly. That the purchaser at said sale was entitled to the land purchased by him, and that when the sale was confirmed and the deed made, the latter related back to the sale, and that he was entitled to a deed at the time of the sale.

The court declined to give the instructions in the form and terms in which they were asked for; but instructed the jury, that the decree and proceedings in forfeiture adduced in evidence by the plaintiff were

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conclusive to show that the title under the grant to Honore Girond had been regularly forfeited to the commonwealth, and that the rights and interests acquired by the commonwealth or the literary fund had been passed to the purchaser at the sale made by the commissioner under said decree; and that it was not competent to contradict such forfeiture: But that the commonwealth took nothing by the forfeiture aforesaid, other than the right, title and interests which existed in those in whose name and for whose defaults such forfeiture accrued, and as the same were at the time of the forfeiture; and she took the same in the plight and condition in which it stood at the time of the forfeiture.

The court further instructed the jury, that in as much as the patent for one hundred acres to the defendant bore date on the 1st day of April 1841, that he could not be in a condition to take the benefit of the act of March 18th, 1841, which only applied to patents issued previous to the 1st day of April 1841, if even in other respects he had shown himself within the provisions of that statute, by the payment of taxes, &c.; that the purchaser at the sale aforesaid became entitled to all the rights which had vested in the commonwealth or literary fund by the forfeiture aforesaid, and that his deed from the commissioner, when made, related back to the time of the sale of the said land.

The court further instructed the jury, that if the statute of limitations had commenced to run by reason of the adversary possession of the defendant against the said Honore Girond, under whom the plaintiff claims by the forfeiture, sale and conveyance aforesaid, prior to the said forfeiture, that then and in that event the statute would continue to run, notwithstanding said forfeiture; and that if such adversary possession of the land in controversy was held by the defendant and those under whom he claimed, under a

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claim of title, legal or equitable, commencing before such forfeiture, and continuing for seven years uninterruptedly, before the institution of the suit, that it would bar a recovery in this action.

The court also, in reply to an enquiry of the defendant's counsel, expressed the opinion that the forfeiture of the land granted to Girond did not accrue or become complete "until the decree of forfeiture was entered declaring the land to be forfeited."

To all these opinions of the court the plaintiff excepted; and the jury having found a verdict for the defendant, he moved the court to set it aside and grant him a new trial. The motion was overruled, and the plaintiff again excepted; this bill of exceptions setting out the facts proven in the cause by reference to the first bill of exceptions, in which they were fully stated. The court gave judgment for the defendant; and the plaintiff obtained a *supersedeas* from this court.

Fisher, for the appellant.

There was no counsel for the appellee.

LEE, *J.* It is a maxim of great antiquity in the English law, that no time runs against the crown, or, as it is expressed in the early law writers, "*nullum tempus occurrit regi.*" *Magdalen College Case*, 11 Coke 68-74; S. C., 1 Roll. R. 151; Bracton, lib. 2, ch. 5, § 7; Britton, ch. 18, p. 29; 8 Bac. Abr. "Prerogative," E, p. 95; 7 Comy. Dig. "Prerog.," D, 86, p. 90. And it may be laid down as a safe proposition, that no statute of limitations has been held to apply to suits by the crown, unless there has been an express provision including it. *United States v. Hoar*, 2 Mason's R. 311.

The reason sometimes assigned why no laches shall be imputed to the king, is, that he is continually

busied for the public good, and has not leisure to assert his right within the period limited to subjects. Coke Litt. 90; 1 Black. Com. 247. A better reason is, the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. *Sheffield v. Ratcliffe*, Hob. R. 347; *United States v. Hoar*, 2 Mason's R. 311; *The People v. Gilbert*, 18 John R. 227; *United States v. Kirkpatrick*, 9 Wheat. R. 720-735. This reason certainly is equally, if not more, cogent in a representative government, where the power of the people is delegated to others, and must be exercised by these if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeeded to the rights of the king of Great Britain, and formed independent governments within the respective States. *Inhab. of Stoughton v. Baker*, 4 Mass. R. 522; *The People v. Gilbert*, 18 John. R. 227; *Kemp v. Commonwealth*, 1 Hen. & Munf. 85; *Nimmo's ex'or v. Commonwealth*, 4 Hen. & Munf. 57; *Chiles v. Calk*, 4 Bibb's R. 554; *Commonwealth v. McGowan*, Ibid. 62. And though it has been sometimes called a prerogative right, it is in fact nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments. *Per Story, J., United States v. Hoar, ubi supra.*

Independently of the particular reason above referred to, another has been advanced, founded on the presumed legislative intention. In general, legislative acts are intended to regulate the acts and rights of citizens; and it is a rule of construction not to embrace the government or affect its rights by the general rules of a statute, unless it be expressly and in terms included or by necessary and unavoidable implication. *United States v. Hoar, ubi supra*; *People v. Gilbert*, 18 John. R. 227.

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This exemption from the imputation of laches and the operation of the statutes of limitation is not confined to debts and demands of a personal nature in favor of the sovereign, but extends also to lands and real estate held *jure coronæ*. Bracton, lib. 3, ch. 3, p. 103; *Lee v. Norris*, Cro. Eliz. 331; *Chiles v. Calk*, 4 Bibb's R. 554; *Johnston v. Irwin*, 3 Serg. & Raw. R. 291. And accordingly we find it treated as a settled maxim, that there can be no adversary possession of lands against the commonwealth, and that no time will bar her recovery, or that of her grantee, against the party holding, except only in the solitary case specially provided by statute, of a settlement of thirty years, accompanied by payment of taxes or quit rents within that time. *Gore v. Lawson*, 8 Leigh 458; *Tichanal v. Roe*, 2 Rob. R. 288; *Shanks v. Lancaster*, 5 Gratt. 110. See also *Ward v. Bartholomew*, 6 Pick. R. 409.

But though the general rule will not be controverted, it may be said that it will not apply in the case of a forfeiture of lands to the commonwealth for failure of the owner to comply with her revenue laws, where an adversary possession had been commenced against the former owner before the forfeiture.

It is true, in a certain sense, the commonwealth takes the land on forfeiture in the same plight and condition in which it stood at the time of the forfeiture. The commonwealth takes the estate and title of the former owner, and no other. If, at the time of the forfeiture, his title were absolutely bound by the adversary possession of another, it may be no title would vest in the commonwealth, unless it were saved by the existence of her lien on the land for arrears of taxes; a point upon which I express no opinion. But if, when the forfeiture accrued, the right of entry still remained to the owner, though an adversary possession had been commenced, the possession as to her

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must lose its adversary character, and she must take and hold the subject with the same rights, privileges and immunities which pertain to any other lands held by her in her demesne. I can perceive no good reason why any discrimination should be made, or why she should hold forfeited lands upon different principles and with diminished privileges from those applying to other subjects of similar character. Certainly, the reason for exemption from the effects of laches and inattention on the part of her public officers is as cogent in such a case as in any other whatever. Nor have I seen any case, so far as my investigation has extended, which warrants any such distinction. The case of *Hall v. Gittings*, 2 Har. & John. 112, fully supports the contrary doctrine. In that case certain lands which had escheated to the lord proprietary (under grant of the English crown) were confiscated to and vested in the state of Maryland under the act of October 1780, ch. 49, without office found or actual entry. Prior to the confiscation adversary possession of the land had been taken and was held against the proprietary. Yet it was held that upon the passage of the act of confiscation such possession ceased to operate against the state during the time the title was vested in her, and that the defendant could not, upon the strength of such possession, resist the right of her subsequent grantee to recover. See also *Harlock v. Jackson*, 1 Constit. R. (S. C.) 135.

The opinion of the court in *United States v. White*, 2 Hill's N. Y. R. 59, might seem to countenance a different doctrine. It was an action on a promissory note by plaintiffs as endorsees against defendant as maker. The defendant pleaded *actio non accrevit infra*, &c., and other pleas; to all of which the plaintiffs demurred. The court said that if the statute had commenced to run before the endorsement, it would continue to run afterwards even against the plaintiffs, and

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their privilege would not apply; but upon the pleadings it held that the plaintiffs became the holders of the note before its maturity; and judgment for plaintiffs. Here, then, the question did not arise, and what was said by the court was *obiter* merely. And it might too not be difficult to show a marked difference, in reference to the effect of the statute, between the case of a state taking a note by contract of endorsement, voluntarily, and that of acquiring title to real estate by act of law under a forfeiture. The case of *United States v. Buford*, 3 Peters' R. 12, was *assumpsit* for moneys claimed from the defendant upon a receipt, in which he had promised to account for the same. The plaintiff claimed an assignment to the United States from the original contracting party; more than five years had elapsed after the cause of action arose before the assignment was made, and the statute of limitations was pleaded. The Supreme court held that as the bar of the statute was complete before the assignment, the plaintiffs could not recover; but it appears to be conceded that if the statute had not run its course when the assignment was made, the character of the claim might be so changed that it would be thereafter withdrawn from its operation.

I think, therefore, that as the right of entry of Girond had not been barred at the time of the forfeiture, if that were even fixed at the time assumed by the court, the possession of the defendant after that time ceased to be adversary, and became, as said in *Harlock v. Jackson*, *ubi supra*, the joint possession of himself and the other members of the community; and that the court erred in its opinion that the statute continued to run against the commonwealth. And this view I consider is fully sustained by the opinion of this court in the cases of *Staats v. Board*, 10 Gratt. 400, and *Hale v. Branscum*, 10 Gratt. 418.

According to the decisions of this court in the cases

just referred to, and also that in the cases of *Wild v. Serpell*, 10 Gratt. 405, and *Smith v. Chapman*, Id. 445, the Circuit court also erred in its opinion as to the time at which the forfeiture under the Girond grant occurred or became complete. It appears to have proceeded on the notion that some inquest of office, or decree, or other proceeding should have been had in order to declare and perfect the forfeiture. Nothing of the kind was necessary. The act of the 27th of February 1835, Sess. Acts, p. 11, declaring that lands which had been omitted from the books of the commissioners of the revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same, except such as might be released by law, was intended by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding, or finding of any kind, in order to consummate it. It was perfectly within the competence of the legislature to declare such forfeiture and divest the title by the mere operation of the act itself, and the whole legislation upon the subject of delinquent and forfeited lands plainly manifests the intention to exercise its power in this form. By the fourth section of the act of March 6, 1827, Supp. Rev. Code 1819, p. 314, the title to lands vested in the literary fund for nonpayment of taxes, and not redeemed, is transferred in certain cases to those who may have settled and improved them under title claimed under a grant from the commonwealth. The language of the act is "that all right, title, &c.," (of the literary fund,) "shall be, and the same is, *hereby relinquished to and vested in* such person," &c. By the second section of the act of April 1, 1831, Supp. Rev. Code, p. 345, certain delinquent lands and lands sold and theretofore redeemed by the executive under a previous act, which should not be redeemed by a

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given day, were declared to be forfeited. The language of the act is, "shall be from and after (the day named) absolutely forfeited," &c.; "and such lands, &c., shall be thenceforth, and the same are hereby, absolutely vested in" the literary fund. The eighth, ninth, and tenth sections of the same act provide for transferring the title to certain forfeited and escheated lands to persons in possession under other grants in certain cases; and by the eleventh section a mode is provided by which the occupant is to obtain a decree, on petition to the proper court, investing him with the title. But by the act of March 10th, 1832, this proceeding is dispensed with, and the title immediately vested by the operation of the act. Its language is, "all such lands, &c., shall be, and the same are hereby, declared to be absolutely vested in such holders, and, as to those not yet forfeited, immediately after the forfeiture, &c.; and such holder, in any action brought against him for the recovery of such land, shall have the full benefit of the commonwealth's right hereby intended to be transferred to him." The act of February 1835, in similar language, forfeits omitted lands, if not assessed and the taxes paid, after the 1st of July 1836; and the title thus vested in the commonwealth is transferred to and absolutely vested in any person in possession claiming *bona fide* under a grant bearing date previous to the 1st of April 1831.

All these provisions, and those of similar character in other acts, would seem to be utterly incompatible with the idea of an inquest of office, or any such proceeding, being necessary to consummate or give effect to the forfeiture.

I think there is little aid to be derived in construing these statutes from the common law doctrines in relation to forfeiture of land for crimes to the crown. These acts were designed to remedy certain evils for which prompt, summary and decisive measures were

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indispensable. They were intended to perform the office and perfect the remedy proposed by their own mere force and operation. Where by statute a forfeiture of goods is created, the property, by the forfeiture, is divested out of the owner without any proceeding on the part of the state, and becomes vested in the government. Coke Litt. 128; *Wilkins v. Despard*, 5 T. R. 112; *Fontaine v. Phoenix Ins. Co.*, 10 John. R. 58; *Kennedy v. Strong*, 14 John. R. 131. Where it is of lands, the same rule should prevail if such is the plain intention of the legislature. See *Barbour v. Nelson*, 1 Litt. R. 60. Even at common law, though lands or goods forfeited for treason or felony could not be seized into the king's hands, nor granted by him to another, before attainder, yet the forfeiture of the lands relates to the time of the offence, to avoid all subsequent sales and incumbrances; otherwise as to goods. Coke Litt. 390 b; Hale's Pl. C. 264; 4 Com. Dig. "Forfeiture," (B 6,) p. 412; *Ibid.*, p. 413, and note u; 4 Bac. Abr. "Forfeiture," D., p. 346.

By the act of February 9th, 1814, 2 Rev. Code 1819, p. 545, all previous laws forfeiting omitted lands were repealed, and all previous forfeitures of the same released; and as no provision was made subsequently in relation to such lands until the passage of the act of February 1835, no forfeiture could occur previous to that time. By the act of March 1836, Sess. Acts, p. 7, further time was allowed till the 1st of November 1836 for the owners of omitted lands to enter the same on the books, and have them charged with taxes, and to pay such taxes, as prescribed by the second section of the act of February 1835. But on failure of such owners to perform this duty, the forfeiture became absolute and consummate from and after the 1st of November 1836, and the provisions of subsequent laws giving time for redemption did not release

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the forfeiture which had accrued, except in such cases where the owner availed himself of the opportunities of redemption thus afforded.

In this case, therefore, the forfeiture accrued and became complete on the 1st of November 1836, and the Circuit court erred in not so instructing the jury, instead of fixing it at the date of the decree for the sale, or decree of forfeiture, as it is styled in the bill of exceptions.

I think the Circuit court committed no error in instructing the jury, that as the defendants' grant bore date on the 1st of April 1841, he was not in a condition to take the benefit of the act of March 1841, though in other respects he could show himself to be within the provisions of that act, because it only applied to grants issued previous to the 1st of April 1841; and that the purchaser at the commissioner's sale acquired all the right vested in the commonwealth by the forfeiture of the Girond title, and that his deed from the commissioner related back to the sale of the land. But I do not perceive why the court refused to instruct the jury, that if the land embraced by the defendant's grant had been before granted by the commonwealth to Girond, nothing passed to the defendant under his grant. The court very correctly refused to exclude it from the jury, because in doing so it would have undertaken to decide that the boundaries of the grant to Girond did in fact embrace the land covered by the defendant's grant—a matter which it was the province of the jury to determine; but if the jury should be of that opinion, the court should have instructed them that the commonwealth's title passed by the elder grant to Girond, and there remained nothing which could pass by the junior grant to the defendant. That before the grant to the defendant issued the title under the Girond grant had been forfeited to the commonwealth will give no strength to the defen-

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dant's grant; because it was for land entered and surveyed by him as waste and unappropriated land, and there was no act then in force authorizing forfeited lands to be entered as waste and unappropriated; the act which at one time had authorized it having been repealed. And in the absence of such a statutory provision, no title could be acquired to such lands by entry and survey, and a patent obtained for them would be merely void. The law pointed out the mode by which the title to such lands was to be passed, and that was by sale and conveyance by the commissioner of forfeited lands, and any attempt to acquire title to them in any other mode would be utterly ineffectual. When a conveyance should be made in the mode prescribed by law, it would pass the forfeited title and overreach any intermediate grant founded upon an entry and survey; such grant not precluding the commonwealth from making a deed through her commissioner in the appointed mode, which would be effectual to pass the title vested in her by the forfeiture.

Wilcox v. Calloway, 1 Wash. 38; *Whittington v. Christian*, 2 Rand. 353.

In the refusal of the court to give the first and fourth instructions asked for by the plaintiff, in the terms suggested by him, there was no error of which he can complain, because the court did give in substance, if not in the same language, all and so much of said instructions as he could properly require; the portion of the first instruction which seems to have been omitted being so obscurely expressed as to leave in doubt the meaning intended; and it was for that cause, if no other, properly omitted.

With regard to the third instruction: From what I have already said, it will appear that the court erred in refusing to give so much of it as informed the jury that the statute of limitations did not run against the commonwealth upon the facts in this case. Whether,

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however, the statute only commenced to run against the plaintiff from the time of the sale by the commissioner in November 1841, as the plaintiff contended, or whether the time for which the defendant held the land before the forfeiture accrued to the commonwealth is to be added to that for which he held it after the commissioner's sale and up to the institution of the suit, with a view to make out a bar under the statute, is a question which will require very grave consideration when it shall be necessary to decide it. In this case no such necessity exists, because giving to the defendant the benefit of his possession from the time he got the title bond from Hector, under which he claimed title, until the forfeiture took place, (and he can claim nothing more, because he wholly fails to connect himself in any way with the anterior possession held by Smith,) and adding to it the whole period from the sale by the commissioner in November 1841 down to the institution of the suit, it will not amount to seven years' possession, which is necessary to constitute the statutory bar. I leave this, therefore, without further comment.

For the reasons I have thus endeavored to assign, I am of opinion to reverse the judgment, and to remand the cause for a new trial.

The other judges concurred in the opinion of Lee, J.

JUDGMENT REVERSED.

Lewisburg.**KINCHELOE v. TRACEWELLS.**(Absent *Daniel, J.*)1854.
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1. A warrant for an unlawful entry, &c., is a civil action, which may be removed, on motion, without notice, from the County to the Circuit court, if it has remained undecided for a year or upwards: And the time is to be estimated from the organization of the court summoned to try it.
2. To entitle the plaintiff to recover upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. But if the warrant does not state the withholding of the possession by the defendant, that may be aided by the complaint, which states the fact.
3. Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is legal and which is illegal.
4. The boundaries of two coterminous owners of land interlock; and the party claiming under the elder patent enters upon his land outside the interlock, and cultivates and improves it, holding continued possession thereof. The party claiming under the junior patent enters on his land outside the interlock, and clears and improves it and lives upon it, the land in the interlock being uncleared; and he exercises such continued acts of ownership over the whole land lying within the interlock as constitutes an adversary possession thereof, though but a part of it is cleared and enclosed; and after thus living on his land and acting for upwards of five years, he dies in possession, and his heirs continue to hold possession, and claim and exercise like acts of ownership over the land within the interlock. **HELD:**
 1. The possession of the heirs is not limited to their inclosure.
 2. The entry of the party holding under the senior patent is tolled by the five years' possession and descent cast; and he cannot recover by a warrant of unlawful detainer.
5. A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass the title to the grantee.
6. In 1831, and until the passage of the act of March 30th, 1837, no possession short of fifteen years, unaided by a descent cast, would bar the entry of one having right or title to the land.

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7. An entry upon land in the possession of another, in order to operate an ouster and give a possession to the party entering, must be with claim of title: But the claim of title need not be under a deed or other writing; or, if it is under a deed, it is not necessary that his possession shall be restricted to what shall prove to be within the precise boundaries of his deed.
8. Whatever may be the effect in ejectment or a writ of right of the party in possession having taken that possession under a mistake as to the true boundary of his land, in a warrant of unlawful detainer the question is whether in fact such entry had been made and possession taken, and how long before the institution of the suit; and the mistake, if it existed, is wholly unimportant.
9. The court should refuse to give an instruction where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause; or where it is irrelevant or not applicable to the evidence.
10. Though the court below should err in deciding upon a proposition submitted to it, yet if it can be seen from the bill of exceptions that the decision did not and could not affect the merits of the case, it is not ground for reversing the judgment.

On the 26th of May 1849 Nestor Kincheloe made complaint that Mary, Moses, Aaron and Wesley Tracewell had unlawfully turned him out of, and against his consent withheld from him, the possession of a certain tenement, containing by estimation twenty-five acres of land, lying in the county of Wood, whereof he prayed restitution. This complaint was accompanied by his affidavit to the truth of the facts stated in his complaint. On the same day a warrant was issued by a justice of the peace for the county of Wood, which recited that Kincheloe had made complaint that the Tracewells unlawfully and against his consent withheld from him the possession of a certain tenement, &c., and directed the sheriff of the county to summon the parties to appear at the court-house of his county on the 7th day of June 1849, to answer the complaint; and also directed the sheriff to summon two justices and a jury to appear there at the same time to try the complaint.

The court was organized on the day appointed, and an order was made directing the surveyor of the county to make a survey of the land in controversy; and it then adjourned until the 23d of the same month. The court seems afterwards to have adjourned until the 17th of August, when the defendants moved the court to quash the warrant and complaint; which motion was overruled. A jury was then impaneled for the trial of the cause, which failed to agree in a verdict and was discharged; and the cause was continued for a trial to be had at the next term of the court. At the July term 1850 of the County court of Wood, on the motion of the plaintiff, and because the cause had remained in that court for more than one year without being determined, an order was made removing it to the Circuit court of the county.

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At the October term 1851 of the Circuit court the defendants again made a motion to quash the complaint and warrant, which was overruled: And at the November term 1852 a jury was impaneled to try whether the defendants, at any time within three years next before the exhibition of the complaint filed by the plaintiff in the cause, did unlawfully enter upon the tenement in the said complaint mentioned, and turn the said plaintiff out of possession thereof; and whether the defendants continued to hold the possession thereof at the time of the exhibition of said complaint.

On the trial the plaintiff claimed under a patent bearing date the 20th day of October 1785, by which there was granted to Mark Hardin nine hundred and nine acres of land lying on the lower side of the Little Kanawha river, about six miles above its mouth, beginning at a sugar tree at the mouth of Grape creek, and running down the river. Hardin sold and conveyed this land in 1805 to Hugh Phelps, who entered

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upon it, but outside of the land in controversy, and cultivated and improved it. In 1821 Phelps conveyed one hundred and fifty acres of his tract of land to Vandiver and Marsh, who took possession of it, and cultivated and improved it. This tract, it was insisted, embraced the land in controversy; but their improvements were not upon that part of it. The land conveyed to Vandiver and Marsh passed by several intermediate conveyances to John Ralston in September 1832; and he conveyed it to the plaintiff, Nelson Kincheloe, in October 1842. There was no doubt that the successive owners of this land from the time of Hugh Phelps had been in the constant occupation and cultivation of it; but no part of their improvements was upon the land in controversy. And there is little reason to doubt that the boundaries of Hardin's patent, and consequently of the plaintiff's conveyance, included this disputed land.

The defendants claimed under a patent to John Gibson for one thousand acres of land, bearing date the 20th of October 1785, the same date as that of Hardin. This land was also on the Little Kanawha river, and called to include the mouth of Tygart's or Grape creek, and run up the river.

John Gibson died, leaving three children his heirs; and his son John is alleged to have transferred his interest in this land to William Laing: but the proof on this point is defective. There was an allotment of a part of the tract to the children of one of John Gibson's heirs, under a decree of the County court of Wood; and there were deeds of partition executed by attorneys in fact between James Gibson and Laing in December 1830, by which the land next to that held by the plaintiff was allotted to Laing. In August 1831 Laing, by his attorney and agent, sold to Arnold Tracewell one hundred acres of his land, and executed to him a bond by which he bound himself to convey

the same to him. This one hundred acres was described as lying on the Little Kanawha, immediately above the mouth of Tygart's creek, beginning at a sugar tree on the bank of the river ; and one of its lines called to run to a corner of Kincheloe, and thence with the line of the tract owned by the plaintiff at the time of the trial, to the beginning. Laing, in May 1833, conveyed his whole tract to James M. Stephenson ; and in August 1834 Stephenson conveyed to Tracewell the one hundred acres purchased by him from Laing.

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Arnold Tracewell entered upon the land purchased by him of Laing in 1831, all of it then being in forest and uncultivated, and in August of that year had a corner marked, and a line run and marked from thence to the beginning corner of Hardin's survey on the river at the mouth of Tygart's creek. This corner and line is that claimed by the defendants in this cause, and includes all the land in controversy in their tract. After running the exterior boundaries of said tract, Tracewell, in August 1832, moved upon the land, taking with him his wife and two children, and continued in possession, claiming up to the marked boundaries, until the year 1834, when he received his deed for the land ; and continued the possession in the same manner, claiming the same marked boundaries, up to the 22d of November 1839, at which time he died.

In 1832 or 1833 Tracewell made some thousand rails upon the land in controversy, and sold them. He also sold timber from it to make some eighty thousand staves ; and in 1837 he took cord-wood from it, and also tan-bark. Whilst he was thus living on the land he bought of Laing, he made sugar on this land in controversy ; and since his death the defendants rented out the sugar camp : And during Arnold Tracewell's life time the family obtained their fire-wood off this disputed land. And during all that time John Ralston,

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under whom the plaintiff immediately claims, and who lived on the land now owned by the plaintiff, was cognizant of the aforesaid acts of ownership, and made no objection thereto. He set up no claim to the disputed territory, and recognized the corner and line marked and run by Tracewell as the dividing line between them.

The family of Arnold Tracewell, who were the defendants, continued to reside upon the said land, claiming the boundaries their ancestor had claimed, exercising acts of ownership over the land in controversy, and took timber therefrom for a barn, until about the year 1845 or 1846, at which time some person (supposed to be the plaintiff in this suit) cut and made some rails upon it, which the defendants hauled off: And some of the family attended at the August quarterly term of the court for that year, for the purpose of indicting the plaintiff for his alleged trespass, when they were met by the plaintiff, who agreed that if they would not try to indict him, he would not trouble them any more for that land: And no indictment was made, nor was there any further difficulty until the institution of this suit.

All the evidence having been submitted to the jury, the plaintiff, after the opening argument had been concluded, and one of the counsel for the defendants was about concluding his argument, moved the court to exclude from the jury all the documentary evidence offered by the defendants, and purporting to deduce title from the patent of Gibson to the defendants, upon the ground that the same did not connect the defendants with the legal title from Gibson. But the court overruled the motion; and the plaintiff excepted.

The defendants then moved the court to give three instructions, which are not stated. The court refused to give them, because they were not considered in all

respects applicable to the case; but in lieu thereof gave the following:

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First. If the jury shall believe from the evidence, that the deed to the plaintiff, and the several deeds of the persons under whom he claims, (commencing with the deed of the attorney of Mark Hardin, the patentee, and the patent to the said Hardin,) embrace the land in controversy, and that from the time the tract claimed by the plaintiff was severed from the residue of the land contained in the said patent, that the several persons under whom he claims, according to the terms of their deeds, resided on and improved and cultivated the same, *but* if none of them resided on, improved, or cultivated any part of the land in controversy, but that the same continued to be a forest, and in a state of nature, until Arnold Tracewell, the ancestor of the defendants, entered upon the said land under his deed from James M. Stephenson; and if they shall believe that the said one hundred acres conveyed by said deed was plainly marked and bounded, that it embraced the land in controversy, and that the said Arnold Tracewell, by virtue of his said deed, entered upon the said land in controversy, claiming the same as his own, embraced by the deeds under which the plaintiff claims, and also embraced in the deed under which the said Tracewell entered with intention to take possession of all within his metes and bounds, (if the said land in controversy should appear from the evidence to be unimproved forest lands,) and took and held actual adverse possession thereof, by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership, such possession operated as a de-seizin of the person owning and in possession of the land claimed by the plaintiff to the interference, notwithstanding the said Tracewell may not have inclosed and cultivated the whole of the land in controversy. And if he so continued in the possession of the land in

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controversy under the said claim until the time of his death, if such continuous possession was five years or upwards, and so died in such possession, that on his death there was a descent cast upon his heirs, which would toll the entry of the plaintiff or those under whom he claims, then being the owner of the land now claimed by the plaintiff; and if the said defendants continued the possession as held by their said ancestor, and had not abandoned the same at any time before the commencement of the present suit, the plaintiff could not, under such circumstances, maintain a warrant for unlawful entry.

Second. If the jury shall believe from the evidence, that the said Arnold Tracewell, the father of the defendants, entered upon the land in controversy and took possession of it at the time and in the manner supposed in the first instruction, and that he remained in such possession for more than three years after he so took the possession; if they shall also believe that the defendants, at the time that their father so took possession, were infants of tender years, they cannot be considered so responsible for any act that he did upon said land as to enable the plaintiff to maintain an unlawful entry against such infants for such acts.

Third. If the jury shall believe that the said Arnold Tracewell took and held adverse possession of the land in controversy at the time and in the manner supposed in the first instruction, and died so possessed, and that the defendants took possession after his death in the manner in which he had so taken and held the same, and had at no time abandoned said possession, and were in the actual adverse possession of said land in controversy at the time of the conveyance to the plaintiff, then his deed was inoperative for the land in controversy so held in adverse possession.

Which instructions were objected to by plaintiff, but were given by the court. To which opinion of

the court giving said instructions the plaintiff excepted. Thereupon the plaintiff moved the court to give the following instructions :

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No. 1. If the jury are satisfied that Hugh Phelps entered under the deed from Hardin, dated 12th day of July 1805, upon the land described in said deed, built a mill, caused a portion of it to be fenced and cultivated by his tenants, intending in so doing to assert his right to the possession of the entire tract, then such acts on the part of Phelps, the same land being wholly unoccupied by any other person, gave him the possession of said tract of land, coextensive with the boundaries of his deed, which possession would continue in Phelps and his assigns, (until there was an actual entry upon some part of said tract, under color of title, with an intention to oust said Phelps and those claiming under him, which intention must be evidenced by building, residence, inclosure, or other open and notorious acts of possession equivalent to residence or cultivation or inclosure,) and such possession so taken by Phelps, and continued for the period of seven years, would be a bar to any right of entry on the part of the defendants or their ancestor, or any other person claiming under the Gibson patent, in the year 1831 or subsequently, the patent of said Gibson being of the same date of the Hardin patent, under which the plaintiff claims.

Nos. 2 & 3 ask the court to instruct the jury that Arnold Tracewell, up to the making of the deed from Stephenson in August 1834, was bounded and abutted by his title bond on and by the line of Daniel Kincheloe, and that the said Kincheloe, and those claiming under him, living on his tract of land called for by said title bond, the law adjudged him or them in possession to his boundary called for by the bond of Tracewell, and that occasional acts of cutting timber, getting tan-bark, making rails, or making sugar, outside

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of the calls of said title bond, by said Tracewell, unaccompanied with a paper title, either legal or colorable, would not confer on the said Tracewell any actual possession within the bounds of said Kincheloe and outside of the boundaries of said title bond, and that such acts, up to the time of making of the deed in August 1834, would be adjudged in law to be trespass. That until the making of the deed in August 1834, the said A. Tracewell was bounded and abutted by the line of said Daniel Kincheloe, and that after the making of said deed, it calling for a course common to the deed of Kincheloe and the line of Kincheloe, and the line of Kincheloe called for being marked, are, together with the title bond and the parol evidence before them, to be weighed, and if on the whole evidence they are satisfied the call for and the marking of the beech were intended to be in Hardin's or Daniel Kincheloe's line, and that the surveyor and said Tracewell marked said beech, supposing it to be in Hardin's or Kincheloe's line, then, it being marked by mistake, the jury would reject such mistaken mark, and run the line by the other calls, the course and marked line of Tracewell's deed.

No. 4. If the jury believe that A. Tracewell had taken possession at the time and manner indicated in the first instruction given, as early as August 1834, or in the early part of that year, and had cleared and improved upon the land in controversy, with an intention to take possession according to the metes and bounds of his deed, and did such other open and notorious and habitual acts of ownership upon the said land in controversy as would give him an actual adverse possession, according to the facts supposed in the first instruction given, and so continued in possession, and died in said possession in November 1839, and the defendants, his children and heirs, held and retained the possession so taken by him, then the entry

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of the plaintiff, and building of the fence inclosing a part of the land in controversy within the bounds of his deed, would not so operate as to divest the defendants of their possession of the land in controversy, according to the metes and bounds of their deed, and confine it to their actual inclosure. But if the said A. Tracewell had not been in possession of the land in controversy for five years before his death, so as to cast a descent upon the defendants, and the said Kincheloe entered upon and inclosed a part of the land in controversy under his title, he would thereby divest the defendants of the possession of all the uninclosed lands within the interlock, provided that the said A. Tracewell in his life time, and the defendants after his death, had not been, as is supposed in the first instruction, in the actual and continued adverse possession of the land more than seven years; but if the jury shall believe that, at the time the said Kincheloe entered and inclosed part of the interlock, that the said defendants or their ancestor had not the actual possession of the said land long enough to toll the entry of the said Kincheloe, that the defendants again entering upon the possession of said Kincheloe, thus regained, would be a trespass; and if they continued to hold the possession, this action may be maintained against them, provided it is brought within three years after they regained possession.

No. 5. The patents being read, and there being no parol evidence offered to fix any point whereby the survey of Gibson can be located, nor any evidence other than appears on the face of the papers, the plaintiff's counsel moved the court to instruct the jury what point is by them to be adopted in laying down said survey on the plat, or, in other words, how far below the mouth of Tygart's creek they are to fix the beginning corner required.

No. 6. Move the court to instruct the jury that

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when there are two patents of the same date, and those claiming under one enter and hold under the same for twenty years, from 1805 to 1833, then such title should prevail against the other patent of same date, under which no possession was had until 1833.

All of which instructions the court refused to give, and the plaintiff again excepted.

There was a verdict in favor of the defendants: Whereupon the plaintiff moved for a new trial, upon the ground that the verdict was not sustained by the evidence; and on the further ground of a misdirection of the jury by the court. But the court overruled the motion, and gave judgment for the defendants; and the plaintiff again excepted: And upon his application this court granted a *supersedeas* to the judgment.

Price and Fry, for the appellant.

Fisher, for the appellees.

LEE, J. That a warrant for a forcible or unlawful entry upon lands and tenements and turning another out of possession, or for unlawfully and against his consent withholding possession from the party entitled, under our statute, is a civil action, which, by virtue of the act of the 28th of March 1843, may be removed to the Circuit court, on motion, without notice, after it shall have remained undecided in the County court for the period of one year or upwards, has been decided by this court, after full argument, during the present term, in the case of *Harrison v. Middleton*, *supra* 527. I refer to the opinion delivered by Judge Moncure in that case for a very full and (to me) satisfactory exposition of the reasons which conduced to that conclusion.

By the provisions of the act referred to, any two justices of the peace of the county may meet at the court-house, and form a court for the trial of such a

warrant; when so met and a court is so constituted, it is declared to be a court of record, with power to issue all proper process to bring before them witnesses or other persons whose attendance may be lawfully required by them, and to adjourn from day to day and from time to time till the trial is ended. The sheriff of the county is required to attend upon the justices constituting it, and to execute their orders. The clerk of the County or Corporation court is also to attend them, to record their proceedings, and file away the papers exhibited. A jury is to be impaneled and charged in the manner prescribed by the act; the justices are to suffer the parties to be heard by counsel; to admit all legal evidence offered on either side; to decide all questions of law properly submitted to them; to admit bills of exceptions to their opinions; and in all respects conduct the trial according to the usages of courts of law within this commonwealth. When a verdict has been rendered, the court is to render judgment upon it in favor of the plaintiff or the defendant, according to the nature of the finding; or it may for proper cause set it aside, and grant a new trial, as in other civil causes (Sess. Acts, 1825-6, p. 26, § 3); in which latter case the cause is to be continued to the regular term of the County or Corporation court, and the new trial is to be had therein. The judgment of the justices so rendered is to be regarded as a judgment of the court of the county, and is to be in all respects executed in the same manner as if it had been the judgment of such court at an ordinary term; and either party thinking himself aggrieved may have the same remedy, by writ of error or *supersedeas*, as if it had been the judgment of such court; and if it be reversed, the cause is to be remanded to such court, where necessary. I think it clear, therefore, that a court so constituted is to be regarded as a special County court for the trial of the

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particular cause; and that when two or more justices meet and form such a court, the case is to be regarded, for the purpose of the act above referred to, and all other legal purposes, as pending in the County court; and that after the expiration of one year from that time, if it remain undecided, it may be removed to the Circuit court, according to the provisions of that act.

I think the objection which has been urged on the part of the defendants to the warrant is without any valid foundation. The complaint made and verified by the party under oath may be looked to in aid of the warrant; and, taking them in connection, they may be fairly construed as being for an unlawful entry and turning the plaintiff out of possession of the tenement in controversy, and unlawfully holding the plaintiff out of possession at the institution of the suit. The withholding of the possession by the defendant at the emanation of the warrant was a fact as important to be found by the jury as that of the original turning out, to entitle the plaintiff to a recovery. I think the motion to quash was properly overruled.

The plaintiff's motion to exclude all the documentary testimony offered by the defendant came at a late period, not having been made until all the evidence had been given, and after the opening argument for the plaintiff had been concluded and that of one of the defendants' counsel about closed; but if the motion is to be treated as a motion to instruct the jury to disregard the evidence, and in that view deemed admissible when made, and waiving the question whether the grant to Gibson and the conveyance from Laing to Stephenson, being referred to in the deed from Stephenson to the ancestor of the defendants, as instruments of title under which, together with the title bond from Laing and the deed from Stephenson, the defendants claimed, might not properly have been given in evidence along with the title bond and deed,

for the purpose of proving such a possession under an honest and *bona fide* claim of title as might ripen their claim, however defective originally, into a perfect title, still, for the purpose of proving such a possession, and thus making out a bar under the statute, the title bond and deed from Stephenson were legitimate and proper testimony, though the defendants did fail to connect themselves with the grant to Gibson; and as the motion was to exclude all the documentary evidence of the defendant, it was too broad. Nor was the court bound to discriminate between the different documents offered; but might properly, as it did, overrule the motion for want of a proper designation by the plaintiff of the particular instruments of evidence which ought to have been excluded.

Of the first instruction given to the jury complaint is made that its meaning is obscure, and that, however understood, it states the law incorrectly. The instruction is perhaps somewhat deficient in perspicuity; but if it be examined with some little care and attention, I think its meaning will be sufficiently apparent. Nor is there any such obscurity about it as would render it unintelligible to a jury of ordinary intelligence. It in effect asserts the following propositions: That if the instruments of title under which the plaintiff and the defendants claimed, respectively, embraced the land in controversy; and if the plaintiff and those under whom he claimed had entered upon and taken actual possession of that part of the land embraced within their boundary outside of the interlock with the defendants' boundary; and if the ancestor of the defendants, under his deed, entered upon the land in controversy, (that is, upon the part within the interlock,) claiming it as his own, the same being embraced by his deed, and took and held actual adversary possession thereof, by residence, improvement, cultivation, or other open, notorious and habitual

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acts of ownership, coextensive with the limits of the interlock, the land within the same having continued to be forest and in a state of nature, until so entered upon and taken possession of by the defendants' ancestor, such entry and possession of the latter operated a disseizin of those under whom the plaintiff claimed, to the extent of the interlock, although the ancestor of the defendants may not have actually inclosed and cultivated the whole of the land in controversy. And that if he continued in possession uninterruptedly for five years or upwards, and died so in possession, upon his death a descent was cast upon the defendants, his heirs, which would toll the entry of those so disseized; and that if the defendants continued to hold such possession uninterruptedly from the death of their ancestor until the institution of this suit, the plaintiff could not maintain his action. So understood, I cannot perceive any well founded objection to the instruction. It presupposes an ouster by the defendants' ancestor of the plaintiff to the whole extent of the premises in controversy, the land embraced by the interlock; and affirms that the adversary possession which constitutes it must not of necessity be evidenced by actual inclosure and cultivation, but may be by other open, notorious and habitual acts of ownership, sufficient to amount to actual possession. That such possession may be in this mode is sufficiently established by the cases of *Taylor v. Burnsides*, 1 Gratt. 165, and *Overton v. Davison*, Ibid. 211; and is also supported by the authority of the cases of *Ellicott v. Pearl*, 10 Peters' R. 412, and *Ewing's lessee v. Burnett*, 11 Peters' R. 41. That the premises in controversy were embraced by both of the conflicting claims, and that possession had been taken, by those under whom the plaintiff claimed, of that part of the land claimed by them without the limits of the interlock, would not render actual inclosure or fencing in,

and actual cultivation, indispensable to enable the defendants or their ancestor to acquire possession of the land within the interlock. For this purpose the exercise of acts of ownership, if they were of the character contemplated by the law as sufficiently importing use, occupation and enjoyment, would suffice: and the possession which they would confer would be of a part or the whole, according as they were restricted to a part or coextensive with the entire limits of the interlock.

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It is supposed, however, that the instruction was intended to present the question raised in the case of *Overton v. Davisson*, *ubi supra*, and upon which the opinions of the judges then constituting the court were so much divided, as to the effect of an actual occupation by a junior patentee of part of an interlock upon the claim of another under an elder and conflicting grant, the latter having previously taken possession of that portion of the land within his boundary outside the interlock. But however that may be, the bill of exceptions, as taken, does not present the question. It must be construed as supposing a possession of the whole land within the interlock. Whether it might have been raised upon the evidence in the cause, is immaterial. The instructions asked for by the defendants, and which the court declined to give, are not made part of the record; and in the instructions which the court gave in lieu of them no opinion is expressed on the point.

The second and third instructions given by the court have only been questioned because they refer to the time and manner of taking and holding possession supposed in the first instruction, the expression of which therein is supposed to be elliptical and obscure, or repugnant and contradictory in the terms employed. I have already said there is no well founded objection to the first instruction, nor any serious difficulty in

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understanding its proper meaning. That if the defendants were infants at the time of the acts done by their father, they could not be responsible for those acts in this form, as stated in the second instruction; and if, at the time of the conveyance to the plaintiff, the ancestor of the defendants held the land in controversy in actual adverse possession under his claim, and continued to hold the same until his death, and such possession was, after his death, continued by the defendants, and never abandoned by them, that such conveyance to the plaintiff was inoperative and ineffectual to pass title to the premises so held in such adversary possession, are propositions too plain to admit of doubt or discussion.

We come next to the instructions asked for by the plaintiff, and which the court refused to give.

With regard to the first of the series, it is only necessary to say that it must be understood as declaring to the jury that possession taken by those under whom the plaintiff claimed, of the premises in controversy, and continued for seven years, would be, *in the year 1831, or subsequently*, a bar to any right of entry on the part of the defendants or their ancestor, or any other person claiming under the Gibson grant; whereas, in the year 1831, and until the passage of the act of March 30th, 1837, no possession short of fifteen years, unaided by a descent cast, would bar the entry of one having right or title to the same: and the court, for this reason, might properly refuse to give the instruction.

The second in the series is also objectionable, first, because, if taken in connection with the evidence, as it must be to escape the objection of being a mere abstraction, it assumes that the acts relied upon by the defendants as showing their possession were occasional or interrupted, and not continued and habitual, a matter of which it was for the jury to judge; and

secondly, because it assumes that such acts on the part of the ancestor of the defendants were unaccompanied by any "paper title," legal or colorable, and declares that possession of the premises could not be gained without such a paper title, embracing the same within its boundary. An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain a possession to the party entering, must be accompanied by a claim of title; but it is not indispensable that the claim should be ostensible in the form of a deed or any other writing. The claim, from its nature and character, may be wholly independent of any written evidence. Nor, if the party have a deed or other writing with a specified boundary, is the possession which he may take and hold necessarily restricted to what shall prove to be within the precise boundary. He may take and may hold actual possession of land lying outside his true boundary. Whether he has done so in any particular case is a question of fact and of intention; and whether the acts referred to in this case amounted to such a possession, or were those of a mere trespasser, was a matter for the determination of the jury.

With regard to the third instruction asked for, I have only to remark that I think it was upon a matter wholly irrelevant to the issue before the jury. Whether the entry had been made and possession held, mistakenly, in consequence of the supposed error in running the line and marking the beech referred to, was a question which perhaps might have been material on the general issue in an action of ejectment, or on the issue joined on the mere right in a writ of right. But it could not have been material in this case. Here the question was whether, in point of fact, such entry had been made and such possession held, and how long before the institution of the suit; and I cannot perceive how the origin of the defen-

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dants' possession could tend to illustrate the plaintiff's right, or in any manner aid the jury in determining the line by which the defendants' actual possession was to be bounded.

The fourth instruction asked for by the plaintiff is justly obnoxious to the objection made by him to the first instruction given by the court. The terms in which it is expressed are very vague and indefinite, and the meaning intended is extremely doubtful and obscure. If given, it would have been as likely to confuse the jury as to aid them in their deliberations. But it is otherwise objectionable. It is framed upon the hypothesis that the plaintiff had entered upon and regained possession of the premises in controversy after the entry by the ancestor of the defendants; and there is no proof of such re-entry and regaining of possession. It also assumes as a fact in the cause, that after the plaintiff had thus regained possession the defendants (after the death of their ancestor) had re-entered upon him; and declares such re-entry to be a trespass which might be redressed in this action, if the defendants continued to hold possession, provided it had been brought within three years after they had so regained possession. Now, whether the defendants had entered upon the plaintiff, and dispossessed him, was the very *gist* of the action; and if it had even been stated hypothetically, it would have been no less objectionable, because there was no proof of any such re-entry by the defendants after the death of their ancestor, upon a regained possession of the plaintiff. The only entry that could be imputed to them was the entry made by their ancestor in his life time; and their possession was precisely the continuation of the possession, whatever it was, that he had at the time of his death in 1839. There was no fresh entry made by them, nor any renewal of an interrupted possession. The instruction also imputes to

an entry upon and inclosure of part of the land in controversy by the plaintiff under his title, the effect of divesting the defendants of the possession of all the uninclosed lands within the interlock, without regard to the intent with which such entry and inclosure were made—whether that were to take possession and oust the defendants of the whole, or only the part entered upon and inclosed; and is on this account also obnoxious to just criticism.

The fifth instruction was a direct appeal to the court to settle a fact deemed material in the cause, the locality of the beginning corner of the Gibson survey. It is true the court might be called on to instruct the jury as to the principles of law which might serve to enable them to determine this point; but it was not for the court to apply those principles to the facts of the case, and point out to the jury the place at which they are to place the corner in question. But if this were even otherwise, it was for the party moving the instruction to designate the point which he contended should be adopted, or those which he thought should be rejected; and not to call upon the court, in general terms, to examine the whole case and find out and designate to the jury the point at which the corner in question was to be fixed.

The sixth and last instruction asked for by the plaintiff, in the terms in which it is propounded, presents a mere abstract proposition for the opinion of the court. But if those terms could be aided by taking them in connection with the evidence, then the instruction must be understood as assuming that the evidence proved that those claiming under one of the grants referred to had entered and held possession of the premises from 1805 till 1833, and that no possession had been had under the other grant until 1833, matters in respect of which there should be no interference on the part of the court with the province of

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the jury. Besides, although possession had been taken under one of the two grants referred to, bearing the same date, and had been held from 1805 till 1833, yet if, in the last named year, those claiming under the other grant had disseized those previously in possession, and had continued to hold the premises in uninterrupted adversary possession down to the institution of the suit in June 1849, it by no means followed that the title of those who held the possession prior to 1833 would prevail in this suit. On the contrary, the subsequent adverse possession for sixteen years would be a bar to such title, unless those claiming it could bring themselves within the exception contained in the act of 1837, or were entitled to recover in a writ of right upon the seizin of their ancestor or predecessor. And we must suppose that the comparison of titles made in the instruction referred to the parties in the pending action; for, if it were intended to apply as between previous claimants, it would have been totally irrelevant.

For these reasons, I think no error was committed by the court in refusing to give either of the instructions asked for by the plaintiff. The remark, too, which has been made in relation to the third of the series, is equally applicable to most, if not all, of the others. The case was not ejectment nor a writ of right, but a statutory proceeding involving merely a question of an unlawful entry and ouster on the part of the defendants within the period of the limitation, and a wrongful detainer of possession at the institution of the suit; though the parties seemed to regard themselves as fully embarked in a trial of titles. It is difficult to perceive how the questions mooted in those instructions could tend to illustrate the matter in issue before the jury. Upon a trial of titles between these parties they might no doubt be proper subjects for discussion; but, however decided in this case, they

would seem to be irrelevant and inconclusive. And though decided erroneously, it should seem the judgment should not on that account be reversed, if we can see from the bill of exceptions that they did not and could not affect the merits of the case before the jury. *Hunter v. Jones*, 6 Rand. 541. See also *Le Bret v. Papillon*, 4 East's R. 502.

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Waiving all objections to the form of the bill of exceptions purporting to set out the facts proved, I think the motion for a new trial was properly overruled upon the merits. The plaintiff wholly failed to prove any such entry and ouster on the part of the defendants, on the foundation of which alone he could be entitled to recover. The only entry and taking possession proved was that of the defendants' ancestor, which was certainly not later than 1834; and the possession of the defendants was but the continuation of the possession of their ancestor, which devolved upon them on his death in the year 1839. Whatever might have been the fate of a proper action for the trial of the disputed title between these parties, the plaintiff clearly mistook his remedy in resorting to this proceeding. He has wholly failed to make out a case upon which he is entitled to recover here; and the attempt to try the title in this form must be wholly ineffectual.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of *Lee, J.*

JUDGMENT AFFIRMED.

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O'BRIEN & als. v. STEPHENS & als.

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1. The act of April 3d, 1852, Sess. Acts, ch. 95, § 1, p. 78, gives a remedy in a court of equity to a creditor against his absent debtor, where the debtor has estate or debts due to him in the county or corporation where the suit is brought.
2. The *affidavit* required by the statutes to authorize a creditor to sue out an attachment against the effects of an absent debtor may be made either before or after the bill is filed.
3. When the court has properly taken jurisdiction of a cause against an absent defendant it must proceed to give relief according to the principles of equity.
4. If an absent defendant does not appear in the cause, there cannot be a personal decree against him; but the attached effects can alone be subjected. But if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects.
5. If the absent debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him. Or the plaintiff may, after the debtor's appearance, make the *affidavit*, sue out an attachment, and have it levied on the effects of the debtor, and have them subjected.
6. A demurrer to a bill against an absent defendant will not lie for the failure to aver that an attachment had issued; because the statute in terms provides that this process may issue after the institution of the suit.

The case is stated in the opinion of Judge *Samuels*.

Fisher, for the appellants, and *McComas*, for the appellees, submitted the case.

SAMUELS, *J.* The appellants filed a bill in the Circuit court of Mason county, at July rules 1852, against Abraham Williams and William J. Stephens, wherein it was in substance alleged, that Abraham Williams, of Mason county, and William J. Stephens,

of the city of Cincinnati, were bound to complainants in a forfeited forthcoming bond, on which was due the sum of five hundred and twelve dollars and thirty-two cents, with legal interest thereon from April 6th, 1852, until paid; that it was difficult to notify Stephens on the bond, and that it was useless to notify Williams. The bill further alleged that Stephens had valuable real and personal estate in Mason county; and prayed that Stephens' personal property might be sold to satisfy complainants' demand; and if that should not be sufficient for the purpose, that then the real estate might be sold for the deficiency; and for general relief. To this bill the defendants demurred; and upon the hearing the court below sustained the demurrer, and dismissed the bill. From this decree the appeal before us was taken.

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Immediately after July 1st, 1850, when the Code of 1849 went into operation, a bill such as this could not have been entertained; the statute giving the remedy by foreign attachment in chancery, existing prior to July 1st, 1850, having been repealed by the Code of 1849. A new remedy, however, is given by the statute passed April 3d, 1852, which was in force from its passage. Sess. Acts 1852, ch. 95, § 1, p. 78.

By the statute last named a right is given to a creditor to sue his debtor in a court of equity, if his debt, exclusive of interest, exceed twenty dollars, if the debtor be not a resident of the state, and if he have estate or debts due to him within the county or corporation in which the suit is brought. The statute of 1852, above mentioned, taken in connection with the statute, Code 1849, ch. 151, § 1, gives a creditor the right, upon making an affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant, or one of the defendants, is not a resident of this state, and that the affiant believes he has estate or debts due him within

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the county or corporation in which the suit is, or that he is sued with a defendant residing therein, to sue out of the clerk's office an attachment against the estate of the nonresident for the amount so stated. Section 2 of ch. 151, Code 1849, and section 1 of the act of 1852, give the creditor the right to sue out the attachment after bringing his suit.

In the case before us, the complainants made no affidavit; nor had they sued out any attachment up to the hearing of the cause. The case stated in the bill, however, was such that the affidavit might be made, and the attachment sued out, after the bill was filed. See act April 3d, 1852, § 1.

The question is thus presented, whether the affidavit and attachment were essential to the jurisdiction of the court at the time the cause was heard on the demurrer?

The statute last above cited, § 2, directs that in suits of this nature the proceedings shall be the same as in other suits in chancery. Applying, then, the general principles of chancery practice, as modified by the statute of April 3d, 1852, we must hold that if the court once had jurisdiction, it might rightfully proceed to do full justice between the parties before it, although the claim of the complainant be purely legal; as in case of a bill for discovery and relief in the matter of a legal demand: The right to a discovery gives the court jurisdiction; but having the case before it on this ground, the court should proceed to give a decree for the debt, although it be merely legal in its nature. In this case, the nature of the claim asserted, the residence of the defendant Stephens, and the location of his property, give to the Circuit court jurisdiction of the subject: the mode and measure of relief must be governed by the general rules of chancery practice, as modified by the statute of 1852.

It would be unreasonable to suppose that the mere existence of Stephens' property within the county of Mason was intended to give complainants the right to a general and personal decree in nowise affecting the specific property. The suit must be brought in the county in which the property is placed. There must be some reason for this requisition; and no other than this can be suggested, that the property may be subjected to the payment of complainants' demand. A mere personal decree might be rendered in the courts of any county; a decree subjecting the property would be more conveniently and effectively rendered in the courts of the county in which that property is placed. I am, therefore, clearly of opinion, that the only decree complainants could have had against Stephens, if he had not appeared and made defence, would have been for satisfaction out of his property attached under the process provided by the statute of 1852.

The defendants, however, appeared and made defence, thereby putting themselves fully under the control of the court, for every legitimate purpose in the cause. The attachment was intended to perform two several and distinct functions; one to give the absent defendant notice of the suit brought against him. This mode of giving notice, by levying on property, was formerly in familiar use. In the case before us it became unnecessary to resort to this mode of notice, in as much as the absent defendant appeared and defended himself. The other function of the attachment is to give complainants security for the payment of their demand. This operation of the attachment is wholly for the benefit of complainants; if waived or omitted, it can in nowise injure the defendant, seeing that he has already had notice to defend himself, and has acted accordingly. The complainants, if they elect to do so, may waive a part of their remedy, and

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rely upon another part. They may, therefore, take a mere personal decree against the defendants before the court, which decree the court, in virtue of its jurisdiction over the parties now before it, may lawfully render. Or they may hereafter resort to the remedy by attachment, seeing that the statute authorizes such resort after the suit is brought.

If, however, the law were otherwise, and relief could be had under any circumstances only by attachment, still the objection was not properly taken in this case. A demurrer reaches only such defects as appear on the face of the pleading demurred to; it will not lie for defect or omission of process, or for omission to aver facts not essential to the jurisdiction, but collateral to the pleading demurred to, although they are necessary to justify the relief prayed for. It is the office of a plea, or of an answer, to bring before the court reasons for refusing relief not appearing on the face of the bill. In our case it was not necessary to aver in the bill that an attachment had issued, because the statute, in terms, provides that this process may issue after the institution of the suit.

I am, therefore, of opinion to reverse the decree dismissing the bill; to overrule the demurrer; and remand the cause to the Circuit court, with directions to require the defendants to answer; and that the complainants, on proving their case as alleged, may have a personal decree against the defendants; or that they may, at their election, sue out an attachment in the mode prescribed by law, and subject the property attached to the satisfaction of their demand.

The other judges concurred in the opinion of *Samuels, J.*

DECREE REVERSED.

Lewisburg.EVANS & *als.* v. SPURGIN & *als.*—*Two Cases.*

(Absent Daniel, J.)

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1. A decree of a court of equity set aside on the ground of fraud, upon a bill against the heirs at law of the party procuring the decree.
2. Lapse of time is justly allowed great weight in controversies about transactions long since past. But this weight is thrown in favor of the party who insists that the state of things existing during that lapse of time shall not be disturbed: It cannot be relied on by those seeking to change that state of things.
3. The statute, 1 Rev. Code, p. 475-6, § 4, which provides that a decree made against an absent defendant shall, after seven years, stand absolutely confirmed against him, does not protect a decree procured by fraud, after the death of the absent defendant, without suggesting his death or reviving it against his representative or heirs.

These cases arose out of the case of *Evans & wife v. Spurgin*, reported 6 Gratt. 107. That case came up to this court from the Circuit court of Preston county: And after the cause went back Jesse Spurgin and the heirs of Daniel Lantz filed a bill in that court to enjoin the enforcement of that judgment until the hearing of another suit which the plaintiffs had instituted in the Circuit court of Monongalia county, in December 1849, against the heirs of Gilley C. Evans, wife of John Evans, and the administrator of Staley, for the purpose of setting aside the decree of the 21st of April 1836, made in the case of *Staley v. Lantz*, the proceedings in which case are stated in the report of the case in 6 Grattan.

In their bill filed in the case in Monongalia, after setting out the purchase of the land by Daniel Lantz from Staley, and the proceedings in the chancery cause of *Staley v. Lantz*, they alleged that Daniel Lantz lived in the county of Alleghany, in the state of Maryland,

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until his death, which occurred in 1816; that the place of his residence and his death were facts well known to Nimrod Evans, John Evans, and his wife long before the death of Nimrod Evans, which occurred in 1828: And they charged that John Evans and his wife, with a view to prevent the correction of the errors and irregularities in the case of *Staley v. Lantz*, and with a view to defraud the heirs of Lantz, under whom Spurgin claimed, had procured the removal of the cause in 1833 from Staunton to Monongalia county, after the death of Lantz, and without notice to his heirs, some of whom were infants and others *femes covert*; and that all the subsequent proceedings and decrees were fraudulent.

They further alleged that on the 26th of November 1807 Lantz and Staley entered into a contract with the privity and knowledge of Nimrod Evans, by which the sale by the commissioners to Evans was canceled, and his money probably returned to him, or he had purchased for Staley, and everything pertaining to the chancery suit aforesaid was adjusted and satisfied as it related to both Staley and Evans; and Staley bound himself to convey to Lantz three tracts of land supposed to contain twelve hundred and fifty-nine acres, of which the land in controversy was one, when Lantz should pay to Henry Schroeder, of Baltimore, one thousand eight hundred and fifty dollars for Staley, and when Schroeder's receipts were produced to him Staley bound himself to convey the land. That Lantz did pay the money to Schroeder, and Staley, by deed dated the 16th of August 1809, conveyed the land to Lantz.

The plaintiffs further alleged that Lantz was in possession of the land purchased of Staley in 1805, from that time until his death in 1816; that his widow and children continued in possession until 1834, when a decree was made in the Circuit court of Hampshire,

in a cause instituted by William F. Taylor, a creditor of Daniel Lantz, against his widow and heirs, to subject the lands of Lantz to satisfy the plaintiff's debt, by which decree a sale of the land by a commissioner of the court to George W. Devicman was confirmed; and that in 1839 Devicman sold the land in controversy to the plaintiff, Spurgin; and that the possession had been continued by Devicman and Spurgin down to the time of filing the bill. The prayer of the bill was that the decree of 1836 in the suit of *Staley v. Lantz* might be set aside; that the defendants might be enjoined from enforcing their judgment at law for the recovery of the land; and for general relief.

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The heirs of Gilley C. Evans answered the bill. They said they knew nothing of the facts of the case except what appears from the records of the causes in relation to the land in controversy, and they called for proof. They relied on the fact that Devicman was a purchaser whilst the suit of *Staley v. Lantz* was pending; and, therefore, that he had legal notice of *Staley's* suit; and in fact that Spurgin purchased in 1839 with full knowledge of the decree in that suit of the 21st of April 1836. They say that they had no knowledge of the death of Daniel Lantz at any time previous to the suing out of the writ of right; nor had they any knowledge that John or Gilley C. Evans was informed of that fact at any time before the decree of 1836; and they deny all fraud on the part of said John and Gilley C. Evans, or that they, or either of them, purposely concealed the death of Lantz; or that they delayed bringing their suit for the purpose of suffering the time to elapse in which the supposed errors in the decree of 1836 might be corrected. They deny that there had been any new discovery of facts or evidence affecting this controversy by the plaintiffs since 1836. And they relied upon the decree of 1836 as a bar to

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the relief sought by the bill ; and also upon the statute of limitations, and the delay of the plaintiffs for fourteen years to institute proceedings to impeach the decree of April 1836.

It appears from the evidence that Nimrod Evans, the purchaser of the land in controversy from the commissioners in the case of *Staley v. Lantz*, was in 1807, and continued to be until his death in 1828, clerk of the County court of Preston. And a paper purporting to be a copy of an agreement between Staley and Lantz, though not signed, was produced in evidence, which was proved to be in the handwriting of Evans. By this paper, which bore date the 26th day of November 1807, Staley agreed to sell to Lantz certain lands, supposed to contain twelve hundred and fifty-nine acres, a part of which was the land previously sold to Nimrod Evans ; for which lands Lantz bound himself to pay to Henry Schroeder, of Baltimore, one thousand eight hundred and fifty dollars, and to procure from Schroeder a receipt in favor of Staley for that sum ; when Staley was to convey the lands to Lantz. On the back of this paper was an endorsement, also in the handwriting of Nimrod Evans : "*J. Staley and D. Lantz. Agreement. Copy. N. E.*"

It was also proved by a son of John Schroeder, that there was on his father's books, in the handwriting of a partner in the concern who had since died, an entry under the date of February 19th, 1808, by which John Staley was credited by three notes of Daniel Lantz, amounting to one thousand eight hundred and fifty dollars, with a memorandum at the foot of the entry, "To be considered a cash payment from the 26th November 1807." And it was proved that Lantz was a man in good circumstances from 1807 up to the time of his death, which occurred in July 1818, fully able to meet all his engagements. It appeared further that Nimrod Evans never had the land entered on the

commissioner's books as his, or paid the taxes; but that it stood on these books as the land of Lantz, and the taxes were paid by him and those claiming under him. Devicman was informed of the decree of April 1836 in the same year; and Spurgin knew it in 1839.

When the causes came on to be heard the court below set aside the decree of April 1836, and perpetually enjoined the defendants from proceeding to enforce their judgment recovered in the writ of right case. And from these decrees the defendants obtained an appeal to this court.

N. Harrison and Stanard, for the appellants.

Fry, for the appellees.

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SAMUELS, *J.* These two cases being, substantially, between the same parties, in regard to the same property, and depending upon the same facts, were heard together in this court. Many of the facts are set forth in the case of *Evans & wife v. Spurgin*, 6 Gratt. 107. The judgment in that case determined that the better right at law was in the demandants. After the judgment the tenant Spurgin and others, the heirs at law of Lantz, filed a bill in equity in the Circuit court of Preston county, in which county the land lies, against the heirs at law of Gilley C. Evans, (she and her husband, John Evans, being then dead,) to whom the legal title had descended. The sole purpose of this bill was to enjoin the judgment at law until the equity alleged in the other bill could be decided on. Spurgin also filed a bill in the Circuit court of Monongalia county, impeaching the decree of April 1836, as being obtained by fraud on the part of Evans and wife. This fraud is alleged to have been perpetrated by removing the cause from the District court of chancery at Staunton to the Circuit court of Monongalia, and proceeding therein, as reported in 6 Grattan, above

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referred to, without revivor against Lantz's heirs. The bill alleges that if the heirs had thus been made parties it would have been shown that Staley's decree of 1807 had been fully satisfied; that Nimrod Evans, in making the purchase, was either acting as the agent of Staley, or that any interest he might have had under his purchase was passed to Staley; that the claim asserted by Staley in the chancery cause, and the claim of Nimrod Evans, whatever it was, were fully adjusted by Staley and Lantz with the privity of Evans; that an agreement in writing was entered into between Lantz and Staley on the 26th of November 1807, with the privity of Evans, by which Staley again sold to Lantz the land in controversy, with other land, for one thousand eight hundred and fifty dollars, to be paid by Lantz to the credit of Staley with Henry Schroeder, of Baltimore; that the price was paid accordingly, and that Staley, on the 16th of August 1809, conveyed the land to Lantz, as the contract required.

The facts alleged are established by satisfactory proof. The original agreement in writing is not produced; but a paper in the handwriting of Evans is exhibited, purporting to be a copy of that agreement. The signatures of Staley and Lantz are not affixed to this copy: but that it truly sets forth the terms of the agreement is manifest from the facts that Lantz procured credit for Staley with Schroeder for the price of the land named in the copy, (that is, one thousand eight hundred and fifty dollars,) and that this credit was as of the date of November 26th, 1807, the date of the alleged contract; and that Staley afterwards, on the 15th of August 1809, executed a deed to Lantz for the land described in the copy filed, which includes the land in controversy. The acts performed by Staley and Lantz, respectively, distinctly show what the contract was; and their long acquiescence

in the state of things resulting from those acts stamps the contract with absolute verity. So far as the claim of Evans' heirs depends upon the decree in favor of Staley, it is wholly without foundation in equity.

That Nimrod Evans was privy and consenting to the arrangement between Lantz and Staley is as fully shown as any such fact can usually be shown after such a lapse of time. A paper is produced in the handwriting of Evans, setting forth the terms of the contract precisely as they were afterwards performed by Lantz and Staley, respectively; this paper is endorsed in Evans' handwriting, "*J. Staley and D. Lantz. Agreement. Copy. N. E.*" Evans never in anywise whatsoever exercised any act of ownership over the property, but left it in possession of Lantz and those claiming under him. He was clerk of the County court of Monongalia county, and although the deed to himself from the commissioners in the chancery suit had been admitted to record in his court, yet he never caused the alienation to be noticed on the land books of the commissioner of the revenue by withdrawing the taxes from Lantz and placing them to his own account. If the land was really his, his official duty required him to make the change; and his duty as a private citizen required him to cause the change to be made. The deed from Staley to Lantz was recorded in the office of which Evans was clerk; and under that deed the vendor and those claiming under him have held quiet possession until disturbed by Evans' residuary devisee asserting a title which Evans himself never set up.

Upon all this I hold that Nimrod Evans had no title, good in equity, against Lantz and those claiming under them. It only remains to consider whether the appellees can set up their equitable title against the legal title held by the appellants. Several reasons

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are alleged by the appellants why the equitable title shall not be now set up :

1. Laches.
2. The statute of limitations.
3. That the appellee Spurgin purchased the land with knowledge of the legal title held by Evans and wife.

In regard to the first: Lapse of time is justly allowed great weight in controversies about transactions long since passed. This weight, however, is thrown in favor of the party who insists that the state of things existing during that lapse shall not be disturbed. This is especially the case where the immediate parties to any given transaction are dead. It is presumed that any person having the right of property will ever use that right, such being the ordinary course of things. If no such right be exercised, the presumption is obvious that the right does not exist. In the cases before us, however, the appellees seek only to preserve the existing state of things; they, and those under whom they claim, have been in possession of the subject in controversy, and have held it since August 1809 at least. They are demanding nothing at the hands of the appellants; they seek only to defend their long continued actual possession, by means of their superior equitable title—a title fully proved by the direct testimony, and confirmed by the lapse of time. There is nothing in the record on which to found the allegation that the appellees, or those under whom they claim, have abandoned or waived their rights; on the contrary, from 1805, or from 1809, they have in the most emphatic manner asserted those rights by holding and enjoying their property.

Second. As to the statute of limitations: To sustain this branch of the defence, the appellants rely upon 1 Rev. Code, p. 475–6, § 4. In considering this

objection it must be recollected that the bills before us are filed for the purpose of avoiding transactions occurring after the decree of 1807, and to prevent the fraudulent use of that decree. The nature of those transactions I have already considered. If we could even hold that the party was guilty of no actual fraud in removing the case from the court at Staunton to Monongalia, and proceeding therein without reviving against Lantz's heirs and administrator, yet the gross disregard of the rights of others manifested in that proceeding is equivalent to fraud; it does all the mischief of fraud. The attempt of the appellants to enforce a mere legal title against a clear equitable title, accompanied by long possession, is in itself a fraud; if innocent in acquiring the legal title, they are guilty of fraud in the attempt to use it. If we put ourselves in the place of the legislature, with the purpose of ascertaining the intention of the statute, we cannot suppose for a moment that it was intended to apply to such a case as this. The language of all public statutes is necessarily general; it is the duty of courts to determine their applicability to the circumstances of each particular case coming before them. The statute in question intends to quiet the possession of property acquired under decrees fairly obtained against absent parties, to bar any further litigation in the matter of the suit so decided, after seven years from the date of the decree. It does not intend to quiet parties in the enjoyment of property acquired under a decree fraudulently obtained, and this to the prejudice of parties fraudulently omitted.

Third. The third objection is without force: The vendors of the appellee Spurgin were in actual possession, claiming title, and supposing that title to be good at law. In this they were mistaken; for the title, although clearly good in equity, was not good

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at law. No reason can be assigned why a vendor in actual possession, holding a good equitable title, may not sell his title and deliver possession to another; the circumstance that another holds a legal title, which may be called in at any time and conveyed to the real owner, cannot prevent the real owner from selling.

I am of opinion to affirm the decrees.

The other judges concurred.

DECREES AFFIRMED.

Lewisburg.**BECKLEY v. PALMER & al.**1864.
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September 2d.

1. A defendant in an execution files a bill to enjoin the execution on the ground that a previous execution sued out on the same judgment had been levied by the sheriff on the property of another defendant in the execution, sufficient to discharge it. In such case the bill must be filed in the county in which the judgment was recovered; and the Circuit court of another county has no jurisdiction of the case.
2. In such case it is not necessary that the objection to the jurisdiction should be made by demurrer or plea, but it may be taken at the hearing of the cause.
3. Where the debtor in an execution objects that a previous execution has been levied by the sheriff upon sufficient property to satisfy the judgment, and that he has improperly misapplied the proceeds of the sale of the property, or if he insists that payment has been made to the sheriff which has not been credited on the execution, if he has an opportunity to apply to the court of law from which the execution issued, for redress, he has no right to come into equity for relief.

This was a suit in equity by Alfred Beckley against W. Palmer, William Tyree, and another. The bill was addressed to the judge of the Circuit court of Raleigh county. It alleged that the appellee Palmer had recovered a judgment for a large amount in the Circuit court of Fayette county, against the appellant and one Waite. That upon said judgment an execution issued and a forthcoming bond was given by the defendants, with a third person as surety. That said bond was forfeited, and execution was awarded thereon; and that after the issuing of the execution the whole amount of the debt had been paid to the sheriff into whose hands the same had been placed. That subsequently another execution had issued, and had been placed in the hands of the sheriff of Raleigh

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county, who was about to levy the same and make the money a second time. The bill therefore prayed an injunction to restrain Palmer and the sheriff from proceeding any further upon said execution or judgment. The injunction was allowed on the 27th of August 1852, and was perfected, and the bill filed in the Raleigh Circuit court. Palmer answered, putting in issue the material allegations of the bill; and upon his motion, on the 12th of April 1853, the injunction was dissolved. The appellant thereupon filed an amended bill, alleging that the sheriff, to whom the execution on the forthcoming bond had been delivered, had levied the same upon property sufficient to satisfy it, and that he had sold the same, and misappropriated the proceeds, and had falsely returned that they had been applied to other executions having priority. It also alleged that the sheriff had received a sum of three hundred and forty dollars from Waite, in the sale of a negro, for which credit should be given on the execution; and it prayed a reinstatement of the injunction. The complainant exhibited with his bill copies of the judgment and the various executions sued out upon it, directed to the sheriff of Fayette, upon the last of which a return was made that the property had been sold, and the proceeds applied to executions having priority. He also exhibited the executions sent to Raleigh county. The injunction was accordingly reinstated. Tyree, the sheriff of Fayette, answered. He insisted that the return on the execution complained of was true, and that the property had been sold and the proceeds applied to other executions having priority to that in favor of Palmer, and which they were insufficient to satisfy. He denied any misappropriation of any part of the same. He denied that the price of the negro referred to was applicable to the execution of Palmer, and claimed that it was properly paid on older executions. He also

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alleged that Waite was largely indebted to him individually upon a settlement which had been made between them, in which he had received all credits to which he was entitled.

No evidence was filed on either side, and the cause was heard on the 19th of September 1853, when the court, expressing the opinion that the injunction had been improvidently reinstated, and that there was no sufficient equity disclosed by the original or the amended bill, dismissed the same with costs. And from this decree an appeal has been allowed.

Price, for the appellant.

Caperton, for the appellees.

LEE, J. The first question that seems to require consideration in this case is, whether the Circuit court of Raleigh county had jurisdiction of the cause. It was a bill praying an injunction to a judgment of the Circuit court of Fayette county, upon the ground of payment or satisfaction by levy on sufficient property of the principal debtor, whilst a previous execution was in the hands of the sheriff of Fayette county. It did not call in question the equity of the judgment originally, but insisted that it was now inequitable that it should be further executed.

The solution of this question depends on the true construction of section fourth of ch. 179 of the Code, p. 677. This section provides that "jurisdiction of a bill of injunction shall be in a Circuit, County, or Corporation court of a county or corporation in which the judgment is rendered, or the act or proceeding is to be done, or is doing, or apprehended, except that a County or Corporation court shall not award an injunction to a judgment or proceeding of any other court." And as this was a bill seeking relief against a judgment of the Circuit court of Fayette county at

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the suit of a defendant in the judgment, and praying an injunction to restrain the plaintiff and the sheriff from any further proceeding upon it on the execution sued out thereon, (though the latter was directed to and sought to be levied in Raleigh county,) it would seem to be directly within the terms of the provision, and that the jurisdiction of the bill was in the Circuit court of Fayette. But it is supposed there may be a distinction between the case of an injunction to a judgment for matter of equity existing anterior to the judgment, and for matter arising subsequently, such as payment or the like, which renders any further proceeding to enforce the judgment by execution improper and inequitable; and that in the latter case, if the execution be sent to a different county from that in which the judgment was rendered, and is about to be levied, the defendant may prosecute his bill for an injunction in the court of the county in which the levy is about to be made; the injunction in such case being not to the judgment, but to restrain an act or proceeding contrary to equity, about to be done in that county, within the meaning of the law. But I can perceive no good reason for any such distinction. It is in either case an injunction to the judgment; and in both the relief is afforded by perpetually enjoining the judgment, in whole or in part, according to the nature of the case. In strictness, there is no such thing as an injunction to a judgment, because the court of chancery does not act upon the law court, and neither reverses, rescinds, nor annuls the judgment. It acts upon the party only, restrains him from enforcing the judgment by execution, and punishes him as for a contempt for any violation of its mandate. *Ashby v. Kiger*, Gilm. 153. But in common legal parlance, and for the sake of brevity, its order in such a case is called an injunction to a judgment; and what is always meant is an injunction to proceedings on the

judgment; and such, it will be seen, is the language used in § 10, p. 678, and § 13, p. 679.

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For the purpose of determining the court which shall have jurisdiction of a bill of injunction, and of ascertaining what shall be the condition of the injunction bond, and before what clerk it shall be given, the act in effect classifies injunctions under two heads. First, injunctions to judgments; second, other injunctions to independent or collateral acts or proceedings, having no relation to judgments, which are to be done, or are doing or apprehended. See § 4 and § 10. Of the latter class are injunctions to stay waste, to prevent a nuisance, to arrest a sale improperly about to be made by a trustee, to restrain the doing of an unlawful act prejudicial to the complainant, and for which, if done, he could have no adequate compensation in damage, and the numerous other matters, having no reference to any previous judgment at law, which constitute the proper subjects of injunction; and these are plainly the matters contemplated by the act when it speaks of acts or proceedings about to be done or apprehended. In the latter cases the jurisdiction is assigned to the courts of the county in which the act or proceeding is about to be done or is apprehended; the injunction bond is to be given before the court in which the injunction suit is instituted, and the condition of the bond is to be such as the court or judge awarding the injunction shall prescribe. In the former the jurisdiction is to be in the court of the county in which the judgment was rendered; the bond is to be given before the clerk of the court in which the judgment is, and it is to be with condition to pay the judgment (in case the injunction be dissolved) and all costs that may be awarded and all damages that shall be incurred, and with a further condition, if a forthcoming bond have been given, to indemnify the sureties in such forthcoming bond.

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To the case which has been suggested by way of illustration, a ready answer may be given. It is the case of a judgment in a particular county, upon which an execution has been sued out, directed to the sheriff of a different county, and which the sheriff has undertaken to levy upon property—*e. g.*, a slave, belonging to a third person, a citizen of the latter county, who is no party to the judgment, and who and whose property is in no manner bound by the judgment or the execution issued thereon. Can he not, it is asked, obtain an injunction and prosecute his suit in his own county to restrain the sheriff from illegally seizing and selling his property to pay another man's debt? Must he leave his own county and go with his suit to the court of the county where the judgment was rendered? The answer is, that he may get his injunction and prosecute his suit in the county where he lives, and where the sheriff is about to seize and sell his property. But his injunction is not to the judgment; he does not call it in question for any matter either existing before or occurring since its rendition: he does not seek to stay it in any form, or to arrest its execution by a levy and sale of any property that may be properly liable to it. As to him there is no judgment, no execution, and what he seeks is to protect his property against the unlawful act of the sheriff, who is about to seize it without shadow of authority. It is a collateral act or proceeding *in pais* that he seeks to enjoin, not the due and regular execution of the judgment against those liable to it. If the injunction be allowed, he is not required to give bond with condition to pay the judgment and costs and damages, and indemnify the surety in the forthcoming bond, if any; but the condition of his bond is such as the court or judge may prescribe; and he prosecutes his suit in the court of that county in which the unlawful act of the sheriff is about to be done.

No doubt there may be cases in which the court of a particular county, having jurisdiction upon other grounds, may rightfully enjoin proceedings on a judgment of another county, where such a measure is appropriate to the relief proper to be administered in the cause; but where the sole ground of relief is the right to enjoin proceedings on the judgment, whether for a matter of equity existing anterior to its rendition or subsequently arising, and it is sought by a party who or whose property is liable to execution upon it, I think it clear the case is one of an injunction to the judgment, within the meaning of the act, and that the jurisdiction of the suit is in the courts of the county in which the judgment was rendered; and that a court of another county, to which the execution might chance to be sent, and in which it was levied on property of a defendant, has for that cause no right to entertain jurisdiction of the case.

I think the right to object to the jurisdiction was not lost to the defendants by their failing to plead to the jurisdiction, and that the case is not within § 19 of ch. 171 of the Code, p. 648. That section provides that where a bill shows on its face *proper matter* for the jurisdiction of the court, no exception for want of *such* jurisdiction shall be allowed, unless taken by plea in abatement, which shall not be received after answer filed, &c. Here the objection is not for want of matter proper for the jurisdiction of a court of equity, but because the jurisdiction in the case is expressly assigned to another court; because the court of Raleigh was usurping a jurisdiction pertaining to the court of Fayette. Or if this could be embraced by the terms "matter proper for the jurisdiction of the court," then the bill on its face shows a case not proper for the jurisdiction of the court of Raleigh, and so is not within the terms of the section. It was the duty of the judge who allowed the injunction to direct his

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order to the clerk of the Fayette court ; but, although he failed to do so, it was nevertheless the duty of the party to file his bill and perfect his injunction with the clerk of that court ; and the court of Raleigh should have dismissed the bill whenever the objection was made. Such was the decree in the case of *Randolph's ex'or v. Tucker*, 10 Leigh 655.

The act of December 1818, 1 Rev. Code 1819, ch. 66, § 86, p. 214, was in broader terms than the present act. It provided that after answer filed and no plea to the jurisdiction, no exception for want of jurisdiction should ever afterwards be made. Yet it was held that it only applied to those cases in which, upon the face of the bill, the matter thereof is not proper for relief in equity. *Pollard v. Patterson*, 3 Hen. & Munf. 67 ; *Hickman v. Stout*, 2 Leigh 6. But that act excepted from its operation cases of controversy respecting lands lying without the jurisdiction of such court, and also cases of infants and *femes covert*.

But if I am in error on this point, let us briefly consider the case made. If the original bill could be supposed to have been maintainable upon the ground (not suggested by it, however, as a reason for invoking the aid of a court of equity) that there had been no sitting of the Fayette court since the execution complained of issued, and that there would be none in time to enable him to prevent a levy and sale of his property by a motion to quash, yet, as the material allegation of payment of the whole amount of the execution to the sheriff was directly put in issue by Palmer's answer, and no proof offered to support it, the court could do no otherwise than dissolve the injunction. And though a levy might possibly have been made, yet no sale could have taken place under the execution before the next sitting of the Circuit court, which was to be on the 3d of September, the injunction having been allowed on the 25th of Au-

gust. In the amended bill filed on the dissolution of the injunction, the ground of actual payment of the money by Waite to the sheriff is virtually abandoned. It alleges that the sheriff of Fayette had levied the execution upon property sufficient to satisfy it, but had appropriated the property to his own use, or, if he had sold it, had failed to account for the proceeds, and had falsely returned that it had been sold and the proceeds applied in satisfaction of other executions against Waite having priority. It also alleged that the sheriff had received a sum of three hundred and forty dollars from Waite on the sale of a negro, for which credit should have been given on the execution. He thus stated a case which showed him entitled to full redress at law by a motion in the Fayette court to quash the execution, and an action at law for a false return. Now it may be questioned if all this matter could not have been proved under the allegations of the original bill; and if it could, then there was no reason why the court should have reinstated the injunction, which it had just dissolved. But if they were new and original matters, which could not have been proven upon the allegations of the original bill, then it was improper to reinstate the injunction upon the filing of the amended bill, because it did not and could not allege a want of full opportunity to obtain redress by setting them up in the court of law: for there had been two regular terms of the Circuit court of Fayette between the filing of the original bill and of the amended bill, commencing, by law, the first on the 3d of September 1852, and the second on the 3d of April 1853; and no reason whatever was suggested in the amended bill why the party had failed to avail himself of the opportunity which they afforded. Now, I apprehend a party, to be entertained in a court of equity upon a case of this character, ought to allege some reason why its aid is invoked, instead of seeking

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his remedy in the court of law. It should appear that the latter could afford him no remedy, or an inadequate one, or that he had been deprived of the opportunity of seeking it without any default on his part, or some circumstance should be shown furnishing a reason for withdrawing the matter from the cognizance of the appropriate tribunal, and carrying it into the court of chancery. Nothing of the kind is shown here; but, for aught that appears, the matter might have been as well tried, and as full redress afforded, in the court of law as in the court of chancery.

The case of *Crawford v. Thurmond*, 3 Leigh 85, is not, I think, in conflict with these views. That case involved several complicated questions of law and fact, stated in the opinion of Judge Carr, and which he thought could be better tried in the court of chancery than the law court; and there was an equitable right involved more appropriate for the jurisdiction of the former tribunal than the latter. This case presents a mere question as to the regularity and propriety of the proceeding of the officer of the law court upon an execution placed in his hand, and is very distinguishable from that just cited. It more nearly resembles the case of *Morrison v. Speer*, 10 Gratt. 228, in which this court was of opinion the party had improperly sought relief in the court of chancery when his redress was in the court of law.

It may be added, too, that all the material allegations of both the original and amended bills were denied or directly put in issue by the parties upon whom their gravamen rested, and no proof whatever was offered in support of any of them.

In every view of the case, I think the Circuit court properly refused to grant the relief sought by the bill. I think, however, before dismissing the bill, the injunction should have been formally dissolved, and in that respect that the decree should now be amended,

and, so amended, should be affirmed, with costs to the appellees.

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MONCURE and SAMUELS, *Js.* concurred in the opinion of *Lee, J.*

ALLEN, *P.* concurred in affirming the decree on the first ground stated in the opinion of *Lee, J.*

DANIEL, *J.* concurred in affirming the decree.

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N rents property to T, who undertakes to have certain improvements put up thereon; and he contracts with H to execute the work. H proceeds and does a part of the work, and receives some payments from T; but finding that T is embarrassed, he stops the work, and declares that he will proceed no further with it. N then tells H to go on and finish the work, and he will pay him. H then goes on and does the work, and after it is done settles with T, and takes his bond for the balance due to him. T being unable to pay him, H sues N for the whole balance due him for the work. **Held:**

1. That T not having been released from his liability to H, the promise of N is a collateral promise, and, not having been in writing, is void by the statute of frauds.
2. That the promise alleged in the declaration being an entire promise to pay as well for that done before as for that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and, being an entire promise, it is void as to the whole.

This was an action of *assumpsit* in the Circuit court of Kanawha county, brought by John R. Humphreys against Bradford Noyes, and upon his death revived against his executrix. On the trial it appeared by a written agreement that Noyes had leased certain salt property to James M. Thompson for ten years, reserving rent to a large amount, and that Thompson undertook to make very considerable improvements upon the property; to aid him in doing which Noyes was to advance to him the sum of two thousand dollars. Several witnesses testified that Thompson employed the plaintiff to execute a part of the work which he was bound by his agreement with Noyes to have done; but he being in embarrassed circumstances, the plaintiff, after he had executed a part of

the work, apprehending that Thompson would not pay him, stopped his work, and refused to proceed with it under his contract with Thompson; alleging as a reason for his quitting the work, that he had ascertained that Thompson was in embarrassed circumstances, and unable to pay him, and that he could not afford to lose so much. In this state of things Noyes went up to the place, and said to the plaintiff: "The work is now commenced; it must go on. Go on and finish it: I will pay you for it"; or, "I will see it paid." The plaintiff then resumed his work and completed it, Noyes attending to its execution and giving directions about it all the time it was in progress, which was between four and six months.

A witness also testified, that whilst the plaintiff was at work, Thompson advanced to him, from time to time, four hundred and thirty-six dollars, the largest portion of which was furnished by Noyes; and when the work was completed the plaintiff gave to Thompson his account, which Thompson entered in his book in the presence of the plaintiff, and, deducting the amount he had advanced, ascertained the balance due to the plaintiff to be four hundred and fifty-four dollars and seventy-eight cents. For this balance Thompson gave the plaintiff his bond at nine months. This bond was drawn to be executed by two parties, but it was only executed by Thompson. This witness also testified that Noyes had advanced to Thompson upwards of four thousand dollars towards the completion of the improvements on the property.

It appeared further from the evidence, that the plaintiff had taken the benefit of the act for the relief of insolvent debtors, and had surrendered in his schedule the bond of Thompson; but had not named in his schedule any claim which he had upon Noyes. It also appeared that the debt upon which he had taken the benefit of the said act had been paid off before this suit was instituted.

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The bill of particulars filed in this cause was a copy of the account given to Thompson, as before stated.

After all the evidence had been introduced, the defendant moved the court to give to the jury five instructions, which were given, with certain additions thereto. They are as follows:

1. If the jury are satisfied from the evidence that the plaintiff, after the promises supposed to have been made by the intestate Noyes, and laid in the declaration in this suit, took the insolvent debtor's oath as aforesaid, and in his schedule surrendered the bond of James M. Thompson for four hundred and fifty-four dollars and seventy-eight cents, the balance due from him on the work and labor sued for in this action, and did not set out in his schedule any claim of any kind whatever against the intestate Noyes, from such omission under the insolvent oath the jury may presume an admission, on the part of the plaintiff, that at the time he took the oath the said Noyes was in nowise liable to him for money or property under any antecedent contract or engagement.

2. If the jury are satisfied from the evidence that the work and labor sued for in this action was work which James M. Thompson was bound to perform, and for the doing of which he was liable by his contract with the plaintiff to pay him, no promise by the intestate Noyes to pay for the same, or see it paid, is valid and binding on him, unless such promise is in writing, and signed by him.

3. If the jury believe that the plaintiff, by his parol contract with J. M. Thompson, had a right to recover from him for the work and labor sued for in this action, and that the said work and labor was such as the said Thompson was bound to execute, in such event the promise of the said intestate is collateral, and should be in writing to bind him.

4. If the jury shall be satisfied from the evidence that James M. Thompson, by parol contract, employed

the said plaintiff to execute for him the work sued for in this action, and that such contract was not rescinded ; and when the plaintiff completed the work the parties, Thompson and Humphreys, settled, and the said Thompson executed his bond or writing under seal, for the balance due on the work, to said Humphreys, that such bond extinguished the simple contract in law between them, as well as all parol promises by the intestate to guarantee the payment of such simple contract liability. -

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5. If the jury are satisfied that the contract between Thompson and plaintiff was not rescinded by agreement between them, the mere fact that Bradford Noyes may have agreed by parol to pay Humphreys, or see him paid, does not extinguish the contract with Thompson, or his liability to pay the plaintiff.

The first instruction was given, with the following addition, viz :

That is, if the evidence and all the circumstances in the cause, taken and considered together, shall, in their opinion, warrant such presumption. The evidence in reference to the schedule, and the omission on the part of the plaintiff to mention any claim therein against Noyes, as well as all the evidence in the cause, is submitted to the jury, and it is for them to decide upon it, both as to its weight and effect, and to draw such conclusion from it as in their judgment it shall be entitled to.

The second instruction was given to the jury, with the following explanation :

But if the jury are satisfied from the evidence that the work sued for was not done under the contract between the plaintiff and James M. Thompson, but that the work was performed under an agreement between the plaintiff and Noyes, and a promise on the part of Noyes to pay for it, and that such promise was a direct promise, then, and in that event, such promise would be valid and binding without being put in writing.

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The third instruction was given, with this explanation :

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But that if the jury were satisfied from the evidence that the work was not done under the contract between the plaintiff and Thompson, and that the plaintiff had abandoned under that contract, and that it was done under an original agreement between the plaintiff and Noyes, and that the promise to pay for it was a direct one, then such promise would be binding without writing.

The fourth instruction was given, with the following additions :

But if the jury were satisfied from the evidence that the work was not done by the plaintiff under the parol contract between him and Thompson, but under an original contract between him and Noyes, and that Noyes made a direct promise to pay him for the same, and that the plaintiff did do the work on the faith of that promise alone, then, and in that event, a settlement between Thompson and the plaintiff after the work was completed by the plaintiff, and the execution of his bond or writing under seal, by Thompson to the plaintiff, for the balance due on the work, would not extinguish the simple contract so made between Noyes and the plaintiff, notwithstanding there may have been no rescission of the parol agreement between the plaintiff and Thompson, unless the plaintiff received said bond or writing under seal from Thompson as his bond or writing under seal for said work.

Fifth instruction given, with this addition :

But that although there was no rescission of the contract between plaintiff and Thompson, if the jury was satisfied from evidence the work sued for was done for Noyes under an original contract between him and plaintiff, and that Noyes made a direct promise to pay for the same ; that the work was done on Noyes' credit alone, and on the fact of his promise to pay ; then such promise is binding on him.

To the giving of these additions to the instructions the defendant excepted.

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There was a verdict for the plaintiff for four hundred and fifty dollars, with interest thereon from the 18th of December 1844 until paid: Whereupon the defendant moved the court for a new trial, which was overruled; and the defendant again excepted. This exception, instead of stating the facts proved, referred to the evidence as stated in the first exception. There was then a judgment for the plaintiff; and the defendant applied to this court for a *supersedeas*, which was awarded.

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McComas, for the appellant, insisted :

1. That the instructions asked propounded the law correctly; and that the additions thereto given by the court were calculated to mislead the jury. That the additions to the first instruction asked were inexplicable; and was further objectionable, because the court did not instruct the jury upon the law, but left the whole case to them. That the additions to the second and third instructions assumed a state of facts not authorized by the evidence; and, moreover, used the phrase "direct promise," without any explanation of its meaning, and thus leaving the jury to conclude that an express promise was an original promise.

2. That the undertaking of Noyes was a collateral and not an original undertaking, and, not being in writing, was void by the statute of frauds. And he cited *Cutler v. Hinton*, 6 Rand. 509, and insisted that this case settled the principle that where there is an undertaking for another, and both are bound, then it is not an original but a collateral undertaking, and must be in writing. He stated that other judges had classified the cases. First. Where the promise is made before the consideration for it is obtained. Second. Where the promise is made after the consideration is

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obtained. Third. Where there is a new consideration. The first two classes were held to be within the statute; and the third had been held not to be within it. *Farley v. Cleveland*, 4 Cow. R. 432. But this case showed that upon the last point there was a great conflict of authorities; and in fact it was not sustained by them. But however that might be, the case here did not come within it, as there was in fact no new consideration for the promise of Noyes. He made no new contract with Humphreys, but his promise was to pay for the work done under the contract made by Humphreys and Thompson, for which Thompson continued to be bound; and therefore, according to *Cutler v. Hinton*, the promise was collateral.

Fitzhugh and Doddridge, for the appellee, insisted:

1. That the instructions asked for by the defendant below were based upon a partial view of the facts, and therefore calculated to mislead the jury; and that the additions to them given by the court were only intended to give the law as applicable to all the facts proved in the cause. And they insisted that if the instructions were substantially correct, this court would not reverse the judgment for any mere verbal inaccuracies. *Spencer v. Pilcher*, 8 Leigh 565.

2. That the case did not come within the principles applicable to collateral promises. That there was in fact a new contract, and that upon a new consideration. They referred to *Leonard v. Vredenburg*, 8 John. R. 23, in which Kent states the classes into which the cases are resolved. Of these the third is where there is a new consideration of benefit to the promiser or harm to the other party. *Meech v. Smith*, 7 Wend. R. 315; *Farley v. Cleveland*, 4 Cow. R. 432. In this last case the division is recognized, and numerous cases are cited to illustrate each class: And in the two last cited cases the original party was still

bound. They referred also to *King v. Despard*, 5 Wend. R. 277.

They insisted further that *Cutler v. Hinton* was not at variance with these authorities. That case came clearly within the first class, and was within the words of the statute: That there, there was no new consideration. And they referred to *Ware v. Stephenson*, 10 Leigh 155, as not extending the principle as far as it was stated in *Cutler v. Hinton*. They insisted further that the question as to whom the credit had been given was one for the jury. *Darnell v. Pratt*, 15 Eng. C. L. R. 36.

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ALLEN, P. The cases upon undertakings coming within the scope of that branch of the statute of frauds prescribing the mode in which the special promise to answer for the debt, default, or misdoings of another person should be made, have been numerous, and many subtle, if not shadowy, distinctions have been taken. Every collateral promise to answer for the debt, default, or misdoings of another person is within the statute, and void if not in writing; but original undertakings need not be in writing, not being within the statute. The difficulty is in determining under which head the undertaking in any particular case is to be classed. Where the party undertaken for is under no original liability, the promise is an original promise, and binding though not in writing; the promiser is the party immediately liable, and the undertaking is to pay or answer for his own debt or default, and not for another's. But it has been settled in England that if the party undertaken for is liable, the promise must be in writing. This is the principle decided in the leading case of *Birkmyr v. Darnell*, 1 Salk. R. 27. There, in consideration that the plaintiff would deliver his horse to A, the defendant promised that A should return him safe. This was held to be a

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collateral undertaking for another; for the undertaker comes in aid to procure credit for another; and there is a remedy against both; for the plaintiff could maintain detinue upon the bailment against the original hirer, as well as *assumpsit* on the promise against the defendant. In the note to *Forth v. Stanton*, 1 Wms. Saund. 211, it is said, "that it is clear the mere existence of the debt, default, or miscarriage is not sufficient to support the promise; there must be some consideration for it, and therefore the promise must in all cases be founded on a new consideration. The question indeed is, What is the promise? Whether it be a promise to answer for the debt, &c., of another, for which that other remains liable—not what the consideration for that promise is; for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless it be an extinguishment of the liability of the other party."

The cases of *Goodman v. Chase*, 1 Barn. & Ald. 297, and of *Williams v. Leper*, 3 Burr. R. 1886, illustrate the last proposition. In the first case, the defendant, in consideration that the plaintiff would discharge his debtor, arrested under a *ca. sa.*, promised to pay the debt. It was held unnecessary that the promise should be in writing, for the debtor's liability ended on his discharge, so that the defendant was never liable for his debt; and in *Williams v. Leper*, the defendant, having got possession of goods which were subject to distress for rent in arrear, promised the landlord he would pay him the rent if he would desist from distraining. The judge considered the goods as the debtor; and therefore the promise was not to pay the debt of another, but the debt for which the goods were liable, of which goods the defendant was owner. Nor is it material at what time the promise to pay for the debt or default of another is made, if the debt is a continuing debt for which the debtor remains liable.

In *Matsan v. Wharan*, 2 T. R. 80, the court held that there was no distinction between a promise to pay for goods furnished for the use of another, made before they were delivered and after, if the person for whose use they were furnished is liable at all. Nor is there any distinction drawn by the cases referred to, as decided in the courts of England, whether the parol promise to pay the debt of another is supported by a consideration moving to the debtor or the promisee, provided the original debt continues to subsist as a cause of action against the original debtor: Though in New York, in the cases of *Farley v. Cleveland*, 4 Cow. R. 432, *King v. Despard*, 5 Wend. R. 277, a different rule was adopted; those cases deciding that where there is a new and original consideration, of benefit to the defendant or harm to the plaintiff, moving to the party making the promise, the subsisting liability of the original debtor is no objection to the recovery. In Virginia, the cases of *Waggoner v. Gray's adm'r*, 2 Hen. & Munf. 603, *Cutler v. Hinton*, 6 Rand. 509, and *Ware v. Stephenson*, 10 Leigh 155, have recognized and adopted the rule as deduced from the English cases. In the first case Judge Roane lays down the rule to be, "that where the person on whose behalf the promise was made is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is collateral."

In the case of *Cutler v. Hinton* the defendant made the promise before the goods were delivered, saying he would pay for any goods sold to his son in law, or to any merchant of whom his son in law might purchase, that he would pay for him a certain sum. The promise was held to be collateral, and, being verbal, void under the statute. Judge Carr, after a review of some of the leading English cases, concludes with the remark, "That these cases, out of a vast multitude, serve to exemplify the general principle, that where

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the promisee has a double remedy, both against the promiser and him in whose behalf the promise is made, such promise is collateral, and must be in writing."

In the last case of *Ware v. Stephenson* the consideration for the promise was for the benefit of the promiser; the articles were delivered to a workman engaged in building a house for the defendant; and the question in the case, upon which the judges differed, was, Whether the workman was liable and bound to pay for the articles delivered to him? Judge Brooke stated that it was a well settled principle, that where the party to whom goods are delivered, on the promise of a third person to pay for them, is bound to pay for them, the undertaking is collateral, and, if not in writing, within the statute; but he thought from the facts that there was no original liability on the workman, and that he was not bound to pay for the articles delivered. Judge Stanard, with whom the other judges concurred, thought that the workman was responsible for the articles delivered, and said, "That whatever doubts may at one time have existed respecting undertakings within the scope of the statute, it has long since been definitely settled that when an undertaking is for a consideration to be received by, or articles to be supplied to, a third person, if the transaction be such that the third person is responsible to the person who supplies the articles, or from whom the consideration proceeds, the undertaking is collateral, and, if oral, not binding."

To apply these principles to the present case: It appears from the evidence certified as given upon the motion for instructions, and upon overruling the motion for a new trial, that the testator of the plaintiff in error, by a contract dated the 1st of January 1844, leased a salt property in Kanawha county to James M. Thompson, who bound himself to build a salt fur-

nace, fixtures, &c., at his own expense. The testator of the plaintiff in error by the contract agreed to furnish Thompson the sum of two thousand dollars towards said improvements, and in part payment of their erection. In pursuance of the said contract, Thompson employed the defendant in error to build some cisterns, and to do the work for him under the lease. After doing a part of the work, he stopped it, announcing his determination to leave, declaring he was done with the job, and would not proceed with the work upon the faith or confidence of Thompson being paymaster for it. And thereupon the said testator said to him the work was commenced ; it must go on ; and told him to go on and finish it—that he would pay him for it, or see it paid. The defendant in error thereupon resumed work, and continued until it was finished.

The defendant in error further gave in evidence the declaration of said testator, shortly after the conversation aforesaid, that he would have to pay for the work done or doing by the defendant in error, and that he had already advanced Thompson two thousand dollars for improvements, which the latter, by his lease, was bound to make.

It was further proved by the plaintiff in error, that her testator had advanced to Thompson more than two thousand dollars ; that Thompson could not make said improvements without such advances, and that he was unable to pay the defendant in error for his work according to the contract, either at the time of making the same or at any time since. That when the work was finished the defendant in error rendered his account, being the same stated by him in the bill of particulars filed in the suit, which Thompson entered in his book in the presence of the defendant in error ; the several payments made by Thompson from time to time during the progress of the work were deducted, a balance ascertained, for which Thompson executed

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his bond at nine months. The bond is exhibited, and has two seals to it, but is signed by Thompson alone; and was drawn to be signed by the testator, but there is no proof that he ever agreed to sign it. The insolvent papers of the defendant in error, including the schedule, were also given in evidence, from which it appears that on taking the oath of insolvency, on the 29th of July 1847, he surrendered said note on Thompson, but did not surrender any claim on the testator. This suit was brought in the year 1848; and it was proved that the debt upon which the defendant in error took the oath of insolvency was paid before he instituted this suit.

After the evidence was closed, the plaintiff in error moved for five instructions, all of which were given, with certain explanations and modifications, to which she objected; but her objections being overruled, she excepted; and a verdict being found against her for the balance of the claim, she moved for a new trial, and her motion being overruled, she again excepted.

I think there was no error in the court's explanation to the first instruction moved for. By that instruction the court was asked to tell the jury that from the surrender of Thompson's bond in the schedule, and the omission to set out any claim against the plaintiff's testator, the jury might presume an admission on the part of the defendant in error that at the time he took the oath the testator of the plaintiff in error was in nowise liable to him for money or property, under any antecedent engagement. The effect of the instruction, if given in the terms asked, might have been to have induced the jury to believe that they were bound, from the facts stated in the instruction, to presume such admission, notwithstanding other circumstances in evidence might repel the presumption. The court informed the jury that, in forming their conclusion as to this presumed admission, they

should look not merely to the omission to surrender this claim in the schedule, but to all the facts in evidence. In this, I think, there was no error.

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The second, third and fifth instructions were intended to present, and, as I think, do present, the real question involved in the case; and that is, whether, under the facts, the evidence tended to prove the undertaking was original or collateral? The second and third are the same in substance; and asked the court to instruct the jury, that if they were satisfied from the evidence that the work and labor sued for was such as Thompson was bound to execute, and for which he was liable under his contract with the defendant in error to pay him, in such event the promise was collateral, and should be in writing to bind said testator. These instructions were not irrelevant. The evidence showed a contract between Thompson and the defendant in error; and that part of the work was performed under such contract before the promise by the testator. And the cases referred to establish, that whether the contract is collateral or original depends on the liability of the party undertaken for. The court should have given the instructions as asked for, and without the qualifications annexed to them. The modifications were not warranted by the evidence, and were calculated to mislead the jury. There was no testimony proving, or tending to prove, that a portion of the work was not performed under the contract with Thompson before the promise of the testator. The promise declared upon was an entire promise, covering the whole claim for the work performed by the defendant in error; and the court was not justified in assuming that there was any proof that the work sued for was not done under the original contract between Thompson and the defendant in error. The court was asked to tell the jury that if Thompson continued liable to the defendant in error

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upon the first undertaking, the promise of the testator was not binding unless in writing. The qualification of the court evades this proposition altogether, by informing the jury that if they were satisfied the work was not done under the contract between Thompson and the defendant in error, but under the agreement between the testator and said defendant in error, and the promise of the former to pay for it, and that such promise was a direct one, it would be binding, although not in writing. Although the work may have been done under the promise of the testator, and though the consideration of such promise was sufficient, that does not make it an original promise, if in fact the original contract was with a third person, who continued responsible to the defendant in error, notwithstanding the promise of the testator. By the qualification of the court the jury were instructed that the defendant in error was entitled to recover from the promiser, notwithstanding the continued liability of the original contracting party, because the work was performed in consequence of the promise to be answerable for it. The terms used by the court were calculated to mislead the jury: It speaks of a direct promise, leaving it uncertain whether by that expression was meant an express promise by the testator to the defendant in error, or an original or collateral promise. An express promise to pay would probably be deemed by the jury a direct promise; and if it was intended to be equivalent to an original promise, that was a question of law arising upon the facts upon which the instruction was asked; whereas the qualification refers it to the jury to determine for themselves whether under the facts it was a direct or original promise, or one merely collateral.

The fifth instruction asked the court to instruct the jury, that if the contract between Thompson and the defendant in error was not rescinded by agreement

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between them, the mere fact that the testator of the plaintiff in error may have orally agreed to pay, or to see him paid, did not extinguish the contract with Thompson, or his liability to pay the defendant in error. This was given with the qualification, that although there was no rescission between Thompson and the defendant in error, yet if the work was done for the said testator, under an original contract between him and the defendant in error, that the said testator made a direct promise to pay for the same, and the work was done on his credit and the fact of his promise to pay, it was binding on him. This qualification has no relevancy to the instruction. The proposition it propounded was, that if there was no agreement between the original parties to rescind their contract, a promise by a third person to pay would not extinguish the liability of the first promiser. To this there could be no objection; and if the original liability continued, then the promise would be collateral. The qualification informed the jury that although there was no such rescission and extinguishment of liability, yet the promise, if made under the circumstances detailed, would be an original and not collateral promise. I think that in this the court erred.

The bill of exceptions to the decision of the court overruling a motion for a new trial refers to and adopts the statement of evidence contained in the second bill of exceptions. That bill of exceptions states the evidence of the witnesses examined on the trial, instead of the facts appearing to the court to have been proved by such evidence; and is, therefore, not well taken, under the rule of *Bennett v. Hardaway*, 6 Munf. 125, unless it appears to the appellate court that, after disregarding all the parol evidence of the exceptor, and giving to that of the other party full credit, the decision was wrong: And that, I think, sufficiently appears here.

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The evidence of the defendant in error shows that Thompson, the lessee of the property, had bound himself to the landlord to erect a salt furnace and other fixtures necessary to the manufacture of salt, at his own proper cost and charges; that he made the contract with the defendant in error to do the work for him under the lease; that the defendant in error, under this contract, had commenced and performed a portion of the work, the value of which does not appear; and that he then stopped work and refused to proceed with it under his contract with Thompson, alleging, as his reason for quitting the work, that Thompson was embarrassed, and unable to pay him. Thereupon, the testator of the plaintiff in error made the promise on which the suit was brought. The promise was made after the work had been commenced and a part had been executed. There was no distinct promise to pay for the work thereafter to be executed, as contradistinguished from what had been done. The promise was entire, and extended to all work the defendant in error had contracted with Thompson to do. There was no new stipulation as to price, or the description of work, or the mode of payment. The promise referred to the former contract, which remained unchanged, and amounted to no more than an undertaking that if the defendant would go on and perform his contract with Thompson, the promiser would pay him for the work, or see him paid. Thompson was no party to this undertaking. His liability to pay for the work was not extinguished or reduced by it. The undertaking, so far from annulling, provided for the fulfillment of his contract, and as his responsibility continued, the promise, according to the decisions of this court, was collateral, and not binding unless in writing.

Viewing the evidence in the most favorable light, it could at most be held to establish an original under-

taking for work thereafter to be done. The promise, however, embraced the whole of the work ; that done, as also that to be done. The declaration on the special contract charges it as one entire undertaking to pay for the whole of the work done under the contract, and the bill of particulars filed with the declaration charges the said testator with the whole of it. Under the circumstances, proved by the evidence offered by the defendant in error, Thompson was not released ; no notice of abandonment is proved ; and the note for the balance shows he was held liable by the defendant in error for the whole of the work done. The debt had been incurred ; and though there may have been a sufficient consideration of benefit to the landlord, in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state, to have supported a promise to pay for this liability of Thompson, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective. Chit. on Contracts 61. In the case of *Thomas v. Williams*, 21 Eng. C. L. R. 142, the tenant was indebted for a quarter's rent : the defendant, an auctioneer, was about to sell the tenant's goods, which were on the demised premises, and the landlord being about to distrain for the quarter's rent due, the defendant verbally promised to pay not only the rent due, but the rent which would become due the ensuing quarter. The court held that the promise was void, and, being entire, not even the rent due was recoverable.

Under the case of *Williams v. Leper*, *ubi supra*, and cases of that character, where the party had surrendered the goods or discharged the debt, such promise

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was held valid though not in writing. But in the case of *Thomas v. Williams*, Lord Tenderden, C. J., said, "There is no case in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made." The right vested in the plaintiff, and for which he could have distrained, was the rent in arrear; but the promise of payment went beyond that, to the rent which would thereafter become due, and was void on that account as to all. So in *Head v. Baldrey*, 6 Adol. & Ell. 459, 33 Eng. C. L. R. 109, the promise was void by the statute of frauds for want of a written memorandum as to one of the subject matters, but as to the other no writing was necessary; but the court held the agreement was indivisible and bad altogether. To the same effect is *Mechelen v. Wallace*, 7 Adol. & Ell. 49, 34 Eng. C. L. R. 32; *Lord Lexington v. Clarke*, 2 Ventr. R. 223; *Chater v. Beckett*, 7 T. R. 201; *Loomis v. Newhall*, 15 Pick. R. 159. Upon both grounds it seems to me the verdict was not warranted by the evidence; and that there should have been a new trial.

The other judges concurred in the opinion of *Allen, J.*

JUDGMENT REVERSED.

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1. The act, Code, ch. 96, § 3, p. 443, vests in the County courts a discretion to grant or refuse a license to keep a tavern, in the exercise of which discretion they cannot be controlled by the Circuit courts, either by *mandamus*, writ of error, or *certiorari*.
2. Though the applicant for a license to keep a tavern may bring himself fully within and up to all that the statute requires, so that the County court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license as that the County court may be coerced to grant it.
3. It seems that the County court is bound to act upon every application for a license which is made to it; and if it refuses to act, the Circuit court will coerce it by *mandamus*: But when the County court does act, its judgment and discretion is not to be controlled.

At the May term 1854 of the County court of Mason, Samuel Yeager applied to the court for a license to keep an ordinary at his house, in the town of West Columbia, in the county of Mason. It appeared in evidence that the town of West Columbia is composed principally of a foreign population, amounting to above the number of nine hundred, and that they are principally engaged in mining coal and loading and transporting it to Cincinnati; another portion of the population is engaged in the manufacture of salt. The other population in the village are engaged in various trades, such as coopers and other laborious trades. And there is and has been, and is likely to be, a large immigration to that place of persons, as well transiently as permanently. The applicant had been a licensed tavern keeper for the previous two years; and he proved before the court that he was then a sober man, of good character, and had kept and would probably keep a house useful and orderly, and such as the law

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requires. And he produced to the court the sheriff's receipt for the tax imposed by law on ordinaries.

It was also proved by intelligent and respectable witnesses that two ordinaries were believed to be necessary in the village, and that there was not one. No complaint was made by any person against the applicant.

The County court rejected the application; and Yeager excepted. He then presented a copy of the record to the Circuit court, and applied to that court for a *mandamus* to the justices of the County court of Mason, to compel them to grant him an ordinary license, or show cause to the contrary; but the Circuit court rejected the application. Yeager thereupon applied to this court for a *supersedeas*, which was allowed. He also asked for a *mandamus* and a *certiorari*, in order that if the law afforded him any remedy, it might be enforced in the mode which the court might think most appropriate.

The case was elaborately argued by *Fisher*, for the petitioner, and *Fry*, who was counsel in a similar case, as *amicus curiæ*.

DANIEL, *J.* The legislative provision, on the proper construction of which the questions raised in this case mainly turn, will be found in chapters 38 and 96 of the Code of 1849.

The third section of the first mentioned chapter, p. 443-4 of the Code, provides that for a license to keep a house of entertainment the application shall be, when the house is in a town having a Corporation court, to such court, and when it is not in any such town, to the court of the county wherein it is. If the court be of opinion that the applicant is sober and of good character, and will probably keep a house orderly, useful and such as the law requires, it may

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grant such license ; and if the house be in a town, the court, when it grants the same, may, if the applicant desire it, dispense with the necessity of his providing for horses. If such application be refused, the refusal shall be entered of record ; and a license shall not be granted to the applicant before the next May term, unless by a court composed of the justices to whom the first application was made, or a majority of the acting justices of the county or corporation.

The fourth section of chapter 38, p. 207, of the Code, provides, that no person shall, without license, keep either an ordinary, house of private entertainment, or bowling saloon or alley. And the eighth section of the same chapter provides, that the receipt for the tax on such license as is mentioned in the fourth section shall be produced to the court to which application is made for the license, before such application is considered. If the court reject the application, the tax shall be refunded to the person who paid it.

On the one hand it was insisted at the bar that the terms "may grant such license" are either absolutely imperative, making it the duty of the County court to grant the license whenever the applicant produces the receipt of the proper officer for the tax imposed on such license, and brings himself within the requirements of the fourth section of the first mentioned chapter, or indicative of a purpose to enjoin a duty which is to be performed with discretion—a sound discretion, having a regard to public convenience, and looking to the objects contemplated by the act ; and that the action of the justices in refusing to grant a license may be revised and controlled in a superior court by means of a *mandamus*.

On the other hand it was insisted that the word "may" is used in the statute in its popular sense. That it is permissive, and is employed to grant an authority coupled with a discretion, which latter,

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from its very nature, does not admit of its being guided or superseded by the orders of any superior or appellate tribunal.

In considering these opposing views we may, I think, be greatly aided by a reference to previous legislation on the subject.

The fourth section of the act of 1705, 3 Hen. St. 376, after declaring that whosoever shall retail liquor in their houses, without license first had and obtained, shall forfeit and pay a fine of two thousand pounds of tobacco, provides, that "any one intending to set up an ordinary, or house of public entertainment, shall petition the County court; and they, *by their discretion, shall judge* whether it is convenient to suffer such a house to be set up, and whether the person petitioning be of ability sufficient to comply with the intent of the law in providing convenient lodging and diet," &c. The section then proceeds further to provide, that on "*said petition being approved,*" the court shall take bond of the petitioner, with good and sufficient security, with condition to find and provide, constantly, good, wholesome and cleanly lodging and diet for travelers, and stablage, provender, &c., for horses: And that "the bond and security being thus taken, the court *may grant* their order," &c.

The act of 1748, § 1, 6 Hen. St., p. 71-2, after declaring that every person intending to keep an ordinary, shall first petition the County court, proceeds: "And the justices of the court to whom such petition shall be exhibited shall thereupon consider the convenience of the place proposed, and the ability of the petitioner to keep good and sufficient houses, lodging and entertainment for travellers, their servants and horses," &c. "*And if such petition shall appear reasonable, such court is hereby authorized, and may, if they think fit, grant* the petitioner a license to keep an

ordinary for the term of one year next ensuing the date of such license, and from thence till the next court held for the same county, and no longer; which license shall be signed by the first justice sworn in the commission of the peace for such county; and *may*, upon petition, be renewed from year to year, *if the court shall think fit.*"

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The first of the above recited acts, as we have seen, commits, in terms, the granting of such licenses to the *discretion, judgment and approval* of the justices. And though the words of the act of 1748 are not exactly the same, they are not less expressive of a purpose to confer authority on the justices to consider and act in the matter, free from all control other than the dictates of their own judgment.

The language used in the act of 1792, in reference to the grant of the license, is identical with that employed in the act of 1748. The act of 1819 provides that every person intending to set up an ordinary, or house of public entertainment, shall first petition the court of the county or corporation wherein such ordinary is intended to be, and obtain a license for keeping the same; and the justices of the court to whom such petition shall be exhibited shall thereupon *consider* the convenience of the place proposed, the character of the petitioner for good order, sobriety and honesty, and his ability to keep good and sufficient houses, &c.; and if such petition *shall appear reasonable*, and the court *shall be satisfied* and enter of record that the petitioner is a man of good character, not addicted to drunkenness or gaming, and *shall be of opinion* that he will keep an orderly and useful house of entertainment, *they shall be and are hereby authorized* to grant to such petitioner a license to keep an ordinary."—"Upon like petition and like entry on record, the license *may be renewed* from year to year, as long as the court shall be of opinion that the petitioner hath preserved his

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good character, and continues to keep an orderly and *useful* house of entertainment," &c. 2 Rev. Code, ch. 240, § 1.

The same language is employed in the act of 1840. See ch. 21, sec. 13, Sess. Acts 1839-40.

It is obvious, I think, that there is no such variance in the provisions of these two last mentioned acts, from those found in the preceding acts we have cited, as would denote any change in the policy of the legislature.

Is anything to be found in the 3d section of chapter 38 of the Code of 1849, from which to infer such a change of policy? It is true that the said section does not, in terms, require the court to consider "the convenience of the place proposed." But are we to infer, from the absence of these terms, a purpose on the part of the legislature to enjoin it as a duty on the justices to grant a license to every applicant who proves that he is sober and of good character, and will probably keep an orderly house, furnished and provided with the accommodations for travelers, servants, &c., required by the fourth section? Are all considerations of the convenience of the place proposed to be discarded? This would be to treat the word "useful," employed in the section, as of no importance, and to compel the County court to disregard a matter about which the law says they must be satisfied before they have any authority to grant the license. The probable utility of the house must depend not only on the character and conduct of the person who is to keep it, and on its being managed and kept in an orderly manner, and provided with the necessary diet, lodging, &c., but also on "the convenience of the place proposed," the number of such houses already established at or near such place, and on a variety of other considerations, which will readily suggest themselves to the mind. And I apprehend that

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the right of the court to examine and weigh such considerations, in forming an opinion as to whether the applicant will probably keep a "useful" house, is just as clearly conferred as if given in express terms.

And when we look into the history of our legislation on this subject, instead of finding there anything from which to infer that the unjust or improper withholding by the justices of such licenses, from the citizens applying for them, was an evil to be apprehended and guarded against, we shall find that convictions of the existence of present evil, and fears of future mischief, entertained by the legislature, were the result of views and considerations of a directly opposite nature.

An illustration of this is to be found in the act of 1666, 2 Hen. St. 286. The preamble recites that "the excessive number of ordinaryes and tipling-houses, set up for the advance of private gaine, had been found full of mischiefe and inconvenience," &c. And the act then proceeds to declare, "that the commissioners of each County court be required to take speciall care for the suppressing and restraint of the exhorbitant number of ordinaryes and tipling-houses in their respective counties, and not to permitt in any county more than one or two, and those near the court-house, and noe more unless in publique places, as ports, fferryes, and great roades, where they may be necessary for the accommodation of travellers, according as the said courts shall find the necessities of their counties require," &c. ;

And so again: The act of 1676, 2 Hen. St. 361, after reciting that "it is most apparently found that the many ordinaryes in severall parts of the country are very prejudiciall, and this assembly finde the same to be a generall grievance presented frome most of the counties," proceeds to enact, that "no ordinaryes, ale-houses, or other tipling-houses whatever, by any of

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the inhabitants of this country, be kept in any part of the country, except it bee in James City, and at each side of Yorke river, at the two great ferries of that river; provided, and it is hereby intended, that those at the ferries of Yorke river, as aforesaid, be admitted in their said ordinaries to sell and utter man's meate, horse meate, beer and syder, and no other strong drink whatsoever; and that all other ordinaries, ale-houses and tipling-houses whatsoever, in the country, (except as before excepted,) be utterly suppressed," &c.

Numerous other instances of the like kind might be cited; and in nearly every law on the subject, if we do not find a preamble setting forth the existence of pernicious and hurtful consequences growing out of the multiplicity of such houses, and declaring the earnest desire of the legislature to guard against the evil, we shall find restriction after restriction on the authority given to the justices, showing manifestly that the legislature had fears, *not* that the rights of applicants, or the convenience of the public, might suffer from a failure of the courts to allow the setting up and keeping of a sufficient number of such houses, *but* that the morals of the people might sustain injury from the granting of too many licenses.

It is difficult to conceive why the legislature of 1849, with a knowledge of the policy which thus marks our previous legislation in conferring power on the justices over the subject of granting licenses, should have employed terms, which, in common acceptation, are permissive and not mandatory, and which, in former laws, have been used in the first mentioned sense, if they did not mean to confide such authority to the discretion of the justices.

I can discover in the act of 1849 no indication of a change of legislative purpose; nothing to show that the fitness, propriety and reasonableness of all appli-

cations for such licenses are not still left to the consideration, discretion and judgment of the justices, as fully as by former laws.

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With this view of the nature of the authority given to the County courts, I cannot see how, when they have heard an application, and, in the exercise of their discretion, have pronounced a judgment of refusal against it, the Superior court can undertake to revise the judgment by means of a *mandamus*, without running counter to the law of the subject, as settled by numerous decisions of the courts, as well in England as in this country.

The principle on which the superior courts act, and the extent to which they go in controlling by *mandamus* the action of the inferior courts, in cases where the latter are authorized to act in matters of discretion, is concisely and clearly stated by the judges in the case of *The King v. Justices of Kent*, 14 East's R. 395. It appears from the statement of facts that the justices were authorized by statute to fix the rate of wages of certain classes of laborers therein mentioned; and they refused to hear an application made by a number of persons, representing themselves to be millers, and asking the court to fix the rate of wages, on the ground that, according to a proper construction of the statute, the court had no authority to act, except on the application of servants employed in husbandry. The *mandamus* in that case was allowed, but with the following declaration of their opinions by the several judges:

Lord Ellenborough: "We do not, by granting this *mandamus*, at all interfere with the exercise of that discretion which the legislature meant to confide to the justices of the peace in session. We only say they have a discretion to exercise, and therefore they must hear the application; but, having heard it, it rests en-

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tirely with them to act, or not, upon it, as they think fit."

Le Blanc, J.: "We only say that the justices have authority to act upon the subject matter of the application; and that they are to hear it, and then determine whether, in their discretion, they think proper to fix a rate of wages."

Bayley, J.: "We tell the justices that they are authorized by law to settle a rate of wages for the persons applying; but we do not say they are to exercise that authority in this instance." So in the case of *Ex parte Nelson*, 1 Cow. R. 419, the Supreme court of New York declared the doctrine to be, that when a discretion is vested in any inferior jurisdiction, and that discretion has been exercised, a *mandamus* cannot issue; that the superior court cannot control and ought not to coerce that discretion. The same principle is asserted in the case of *Ex parte Benson*, 7 Cow. R. 363, and in the case of *Gunn's adm'r v. The County of Pulaski*, 3 Pike (Ark. R.) 427. And in *Pickett's Case*, Spencer's N. Jer. R. 134, the court say they never direct in what manner the discretion of an inferior tribunal shall be exercised, though in a proper case they would require such tribunal to proceed to a decision, to the end that said decision may be reviewed in due course of law. And in two cases in 3 Texas R. 51, 88, the rule is stated to be, that the writ will not issue unless to control the performance of an act clearly defined and enjoined by the law, and which is therefore ministerial, and neither involves discretion nor leaves any alternative. In the cases in 1 Alab. R. 15, 1 Morriss (Iowa R.) 31, and 25 Maine R. 296, the same principle is declared.

Other cases of the like character might be referred to, but I deem it unnecessary to cite them, in as much as there are numerous decisions having a more im-

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mediate bearing on the question we are considering. Thus, in the case of *Rex v. Young & Pitts*, 1 Burr. R. 556, which was the case of a motion for an information against justices of the peace for arbitrarily, obstinately and unreasonably refusing to grant a license to keep an inn, the doctrine is thus concisely and strongly stated by Lord Mansfield: "This court has no power or claim to review the reasons of justices of the peace upon which they form their judgment in granting licenses, by way of appeal from their judgment, or overruling the discretion entrusted to them. But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information; or even possibly by action, if the malice be very gross and injurious." He had previously declared, in the progress of the argument on the motion, that the argument ought to be "taken up upon the foot of criminality in the justices."—"For there was no pretence upon any other foot to make a rule upon the justices, who have a discretionary jurisdiction given them by the law." Mr. Justice Denison also expressly "allowed the discretionary power of the justices in granting licenses without appeal from their judgments, or having their just and honest reasons reviewed by any body." He then proceeded to express the opinion, that in cases of clear and apparent partiality or willful misbehavior they might be proceeded against by way of information. The other judges expressed themselves to the same effect.

The same principles were announced in the cases of *Rex v. Davis & Williams*, 3 Burr. R. 1317, and *Rex v. Baylis*, Id. 1318; both of which were also cases of motion for information against the justices for refusing to grant licenses. In the first of these cases, (in which

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the information was granted,) Lord Mansfield emphatically declared that the court granted the information against the justices, *not for the mere refusing to grant the licenses*, which he said *they had a discretion to grant or refuse, as they should see to be right or proper*, but for the *corrupt motive* of such refusal.

And in the case of *John Giles*, 2 Strange's R. 881, in which a motion was made for a *mandamus* to the justices of Worcester to grant a license to Giles to keep an ale-house, the motion was overruled, with the brief declaration by the court, "There never was an instance of such a *mandamus*, and therefore we will not grant it."

The question has been presented in the same shape to the Supreme courts of several of our sister states, and has, so far as we can find from reports of their decisions, been uniformly decided by them in the same way.

In the case of *The People v. Norton & others*, 7 Barb. R. 479, we find the singular instance of an indictment against commissioners of excise for improperly and corruptly *granting* such a license; and in that case the Supreme court of New York say, that "the justices, in granting or refusing licenses under the excise law, do not act solely as judicial officers. *They have indeed a discretion, to exercise which this court will not control by mandamus.* But their duties are so plainly defined that if they disregard them they are liable to an indictment."—"The duty of commissioners of excise in this state is extremely similar to that of justices of the peace in England in granting or refusing licenses to sell ale. The conduct of justices in that respect has frequently been the subject of investigation; and it seems to be clear, says Mr. Russell, that though upon this matter *they have a discretionary jurisdiction given them by the law*, and though discretion means the exercising the best of their judgment upon the occasion

that calls for it, yet if this discretion is willfully abused, it is criminal, and under the control of the Court of King's bench."

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And in the case *Ex parte Pierson*, 1 Hill's N. Y. R. 665, the question as to the power of the superior courts to interfere by *mandamus* was distinctly presented on an application for a *mandamus* to the commissioners of excise to compel them to grant to Pierson a license to keep a tavern. The court refused the *mandamus*, stating that the law conferred upon the justices a large discretion, the exercise of which, either in granting or refusing a license, could not be coerced in any way.

The case of *The Attorney General v. The Justices of Guilford County*, 5 Ired. R. 315, is one having a still closer resemblance to the one before us. There the policy of such laws, the power and duties of the justices in administering them, and the extent to which their action is subject to the control of the superior courts, is discussed by Chief Justice Ruffin with great fullness, learning and ability; and the conclusions to which he came, and in which he was sustained by all the judges, were, that whilst the justices might be proceeded against, by way of information or indictment, for a corrupt exercise of their powers, they could in no case be coerced by *mandamus* to grant a license. In that case the question was fully presented, and seems to have been conducted with the view of fairly testing whether in any case the *mandamus* could go. The justices, in their return to the writ, admitted that the applicant had proved himself to be possessed of all the qualifications which the law required, and stated that at a court previous to the one at which the application was made, the justices, a majority being present, had resolved that thereafter no license should be granted to any person, as they entertained the opinion that the retailing of

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spirituous liquors was against the public policy and a hurt to the morals of the people, &c. And though the relator had shown himself to be a man of good moral character, yet they thought the business of retailing would of itself be, in that place, (the town of Greensborough,) productive of evil consequences; and they insisted that, by the law, the granting of orders for such licenses, or refusing them, was a matter entirely in the discretion and free choice of the justices; and submitted whether they could be compelled by *mandamus* to grant the license, &c.

It is true that the application in that case was for a license to retail liquors; but it will be seen that, in the opinion of the chief justice, he places such an application, under the laws of North Carolina, on the same footing with one for license to keep a tavern. And it will also be seen from his statement of the provisions of the statute in respect to such last mentioned licenses, that it is very similar to our own. The decision is, therefore, directly in point; and the opinion by which it is sustained is, I think, entitled to great respect, as well on account of its intrinsic force as of the well known worth and ability of the learned judge who pronounced it.

The same doctrine is maintained by the Supreme court of Georgia, in the case of *Manor v. McCall*, 5 Georgia R. 524. The court say that the doctrine as to discretion is well defined, and seems to be this: A superior court will not undertake to regulate and control a discretion in the inferior judiciary, which is not and cannot be governed by any fixed principle or rule; and after citing other instances, the court proceeded:

“So in the *granting of licenses, roads, &c.*”—“In this class of cases the inferior courts will be required to act; but they will not be coerced as to the mode or manner of their action.”

The counsel for the petitioner referred us to a recent

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decision of the Supreme court of Kentucky, which he supposed to be the other way. I understood him to say that he had not seen the report of the case, but that it would be found in 14 B. Monroe, and that he had been informed by members of the bar who had seen it, that it sustained the right of the Superior courts to control the action of the justices in the matter of granting licenses to keep ordinaries, &c. The case to which I suppose the counsel intended to refer us is that of *Dougherty v. Commonwealth*, 14 B. Monr. R. 237, as it is the only case on matters of this kind which I can find in the report mentioned. It is true that in that case the Supreme court of Kentucky did reverse a decision of a Superior court, declining to review and control the action of the County court in refusing to grant a license. But the application in that case was not for a license to keep a house of public entertainment, but was an application by a merchant for a license to retail liquor. And the case was brought to the Superior court not by *mandamus*, but by writ of error.

Looking to the grounds on which the Supreme court rests its reversal of the judgment of the Superior court, I think that the case, so far from deciding anything in opposition to the views I have endeavored to maintain, is a strong one in support of them. This will be shown more readily and clearly by a few extracts from the opinion of the court, (delivered by Judge Simpson,) than by any other means I can adopt. After stating the case and making some remarks with respect to the jurisdiction of the courts, the opinion proceeds: "That part of the Revised Statutes which was adopted by the legislature during the session of 1850-51 contains the following section, under the head of Revenue and Taxation, ch. 83, art. 2, § 4: On a license to a merchant to sell spirituous liquors, five dol-

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lars. Licenses to merchants shall be granted by the County courts, only upon satisfactory evidence that the applicant is in good faith a merchant, and his business is that of retailing merchandise; and that he has not assumed the name and business of a merchant with the view and object of obtaining a license to sell spirituous liquors."

At the subsequent session of 1851-52 an act was passed by the legislature, by which it was enacted that no license to a merchant to sell spirituous liquors shall be granted by the clerk of any county, but only by the County courts, *who may, in their discretion, grant* such licenses, provided the applicant is in good faith a merchant. This act was approved the 13th of December 1851. Subsequently, on the 7th of January 1852, during the same session, the remaining chapters of the Revised Statutes were adopted. One of the chapters, on the subject of taverns, tippling-houses, &c., (ch. 99, art. 2,) contains the following section: "A merchant may sell at his store-house, to be taken off and drunk elsewhere than on his premises, or adjacent thereto, any wine, spirituous liquors, or the mixture thereof, in any quantity not less than a quart. But before he shall so sell, he shall obtain from the County court a license therefor."

The opinion then proceeds to state that the Revised Statutes did not take effect till the first day of July 1852; the operation of those adopted at the first session of the legislature, as well as those adopted at the subsequent session, being postponed until that time; and that the application for a license in that case was made after the Revised Statutes had taken effect.

The concession is then made, that "the correctness of the order of the County and Circuit courts depended upon the question whether the act of the 13th

December 1851, so far as its provisions are applicable to this subject, was still in force, or had been virtually repealed by the Revised Statutes."

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The inconsistency between the act of December 1851 with the provisions of the Revised Statutes in relation to the rights conferred by it on merchants to vend spirituous liquors, is thus discussed and shown :

" This right, in its qualified form, that is that not less than a quart shall be sold to be taken off and drunk elsewhere than on the premises, is by the Revised Statutes conferred absolutely upon merchants, subject only to the condition that they shall, previous to its exercise, obtain from the County court a license for the purpose. *The County court has no discretion upon the subject.* It must ascertain judicially the qualifications of the applicant; and if they be such as the law requires, he is entitled to a license as a matter of right. At the time of the adoption of the first part of the Revised Statutes, and prior thereto, a license to a merchant was granted by the clerks of the County courts. The law required it to be taken out merely for the purpose of increasing the revenue. The only change in the law contemplated by this part of the Revised Statutes was a transfer of the power to grant licenses from the clerks of these courts to the courts themselves. The only object of the change was that the qualifications of the applicant might be judicially enquired into, and an existing evil be thereby guarded against. It sometimes happened that persons who were not such actually assumed the name and business of a merchant, with the view of obtaining a license; and under that assumed character procured one from the clerk when it should not have been granted. To remedy this evil, the change in the law was made, and the power to grant licenses to merchants conferred on the County courts. The statute imposed a duty on the court. It not only confere

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jurisdiction to grant a license, but enjoined its exercise.”—“Now if the act of the 13th of December 1851 be in force, it produces a material change in the law upon this subject. *The merchant has not even a certain qualified right to obtain a license ; he has no right whatever ; the County court may grant or refuse a license at its discretion.* This act, therefore, is in this respect absolutely and entirely inconsistent with the provisions of the Revised Statutes.”

The inconsistency between the act of 1850-51 and the provisions of the Revised Statutes being thus shown, the court then express the opinion that the former was repealed by the latter ; and on this ground reverse the action of the Superior court, declining to interfere with the refusal of the County court to grant the license. The case, therefore, so far as it can be cited as an example of judicial opinion worthy of respect in the consideration of the questions in hand, bears with all its weight in favor of the judgment under review.

The case of *The Com'rs of the Poor v. Lynah*, 2 McCord's R. 170, it is suggested, is a decision in favor of the proposition that when an inferior tribunal clearly abuses a discretion with which it is vested, it may be controlled by *mandamus*. Mr. Justice Colcock, in delivering the opinion of the court in that case, it is true, did say, “that whenever a discretion is given, the court will not interfere, *unless it be clearly shown that this discretion has been abused.*” If from this expression we are to imply the opinion that the court ought to interfere where there is such abuse, it is manifest, from a report of the case, that such opinion was uncalled for and extrajudicial ; for in that case the court refused to interfere. And the case, therefore, I think, opposes no force to the strong current of authority to which reference has been had, all tending to the result that for such abuse of discretion by an

inferior court the remedy is to be found not in the civil, but in the criminal process of the superior courts.

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The same remark applies to some *dicta* of Judge Tucker in the case of *Brander v. The Chesterfield Justices*, 5 Call 548. In that case a rule was made, in the District court, against the justices, to show cause why a *mandamus* should not be awarded, commanding them to cause the necessary repairs to be made to a bridge; in answer to which the justices showed for cause: 1. That if the plaintiff had a right to redress, he had a different specific legal remedy by appeal or *supersedeas*. 2. That the order of the County court, refusing to let the repairs of the bridge, was made in the exercise of their judicial authority: And for this latter reason the District court decided that it had no power to award the *mandamus*. This court affirmed the judgment of the District court, on the ground that the matters of fact set out in the bill of exceptions were not sufficient to justify a *mandamus*; but at the same time expressed the opinion that the reason assigned by the District court for its judgment was not a good one. And Judge Tucker, in delivering his opinion, said that he did not regard the order of the County court as one made in the exercise of their judicial authority, but in another character, to wit, as commissioners of police for the county; and he proceeded farther to express the opinion that, in permitting the erection of mills, *in granting licenses to tavern keepers*, and in making orders for building court-houses, &c., the justices performed the functions of commissioners of police, and not of judges. He does not, however, say how far he would interfere with the action of the justices in the performance of these functions. The case did not make it necessary that he should do so; and, indeed, so much of the opinion of the court as negatived the validity of the claim of the

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justices to have acted in a judicial capacity, in refusing to make the order for repairing the bridge, was uncalled for, in as much as the decision of the District court was affirmed on the merits. There is clearly nothing in the case which can be referred to as authority trammeling the action of the court in considering the question now before us.

Left thus free to consider the case as one of the first impression in this court, I have, after the most careful deliberation which I have had in my power to give to it, come to the conclusion, that by the act of 1849 the legislature intended to clothe the County courts with a discretion in the matter of granting licenses for houses of entertainment, in the exercise of which the justices are not liable to be overlooked or controlled by way of *mandamus*. And as the petitioner, with the view of testing the question whether the Superior court could, or ought to, review the action of the County court in any mode, presented, at the same time with his petition for the writ in this case, two other petitions—one for a writ of error to a refusal of the Superior court to grant him a writ of error, and the other for a like writ to the refusal of the said Superior court to grant him a *certiorari* to the order of the County court—I think it proper to add, for reasons which may be collected from views of the law already expressed, that I think there is no mode by which the action of the justices can be appealed from. That the petitioner, by the proof which he furnished in reference to his character, and the probability of his keeping such a house as is contemplated by the law, and by producing to the court the sheriff's receipt for the tax imposed by law on ordinaries, showed that he was a person to whom the County court, if they thought fit, *might* have granted and *may* still grant a license; but that he did not thereby acquire any such right to said license as

places it in the power of the Circuit court, at his instance, to say to the County court, through the medium of any legal proceeding, that they *shall* grant it.

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Whether or no the justices can in any case, under our law, be proceeded against by way of information or indictment, for any alleged willful abuse of their discretion in refusing to grant such licenses, is a question not before us, and about which I deem it unnecessary and improper to express any opinion.

I think the judgment ought to be affirmed.

ALLEN, MONCURE and LEE, *Js.* concurred in the opinion of *Daniel, J.*

SAMUELS, *J.* dissented.

JUDGMENT AFFIRMED.

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KIDWELL *v.* THE BALTIMORE & OHIO RAILROAD CO.

(Absent *Daniel, J.*)

September 4th.

1. A contractor for the construction of a bridge on a railroad, having received the monthly estimates, based upon a particular construction of his contract, without objection, will be held to have acquiesced in that construction, and to be bound by it.
2. The contract providing that the final estimate of the engineer shall be conclusive upon the parties to the contract, that is a valid contract; and the estimate of the engineer, in the absence of fraud or mistake, is conclusive.
3. If the contractor might have refused to abide by the final estimate of the engineer, yet having submitted his charges for the work done to the engineer, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer.
4. The engineer having the right, under the contract, to stop the work, if the means for carrying it on should fail, and having informed the contractor that the work must be stopped unless he would receive his monthly payments in orders which were at a discount, and the contractor having consented to receive them, he is not entitled to recover for the amount of the depreciation of said orders.

The following statement of the case has been prepared by Judge *Moncure* :

On the 5th of August 1839 the appellant, Zedekiah Kidwell, contracted with the appellees, the Baltimore and Ohio Railroad Company, to build and complete, in a workmanlike manner, on or before the first day of September 1840, a bridge, with stone abutments and wooden superstructure, across Little Cacapon creek; all the work and materials of which were to be approved by the engineer or agent of the said company having the superintendence of the work, to entitle the said Kidwell to the compensation stipulated to be paid for the same; it being agreed that the said agent

should have full power, in case he should believe the said work, or any part thereof, to be weakly, or otherwise defectively executed, during its progress, or upon its completion, whether said weakness or defect proceeded from the quality, size, or form of the materials used, or the manner of their use, to order the said weakness or defect to be remedied in any manner that he might point out, and for that purpose to order the said work, or any part thereof, to be taken down and rebuilt; when it should be the duty of said Kidwell to take down and rebuild the same. It was further agreed that said Kidwell should commence working upon the bridge at such time as might be designated by said agent, and at all times, when required, apply his force to such parts of said bridge as the said agent might indicate; and should commence and carry on the stone work so as to prevent any delay in the progress of the graduation connected with the bridge. The said Kidwell agreed to comply with other terms, which it is needless to enumerate. For so doing and performing the work aforesaid, the company agreed to pay at the following rates or prices, viz: For every perch of twenty-five cubic feet in the stone work of said bridge, four dollars, and for every lineal foot in the length of the superstructure, twenty-three dollars. The payments were agreed to be made in the following manner, viz: During the progress of the work, and until its completion, a monthly estimate was to be made by said agent of the quantity, character and value of the work done during the month, or since the last monthly estimate, four-fifths of which value were to be paid to the said Kidwell, at such place as the said agent might appoint; and when the work was completed and accepted by the agent, there was to be a final estimate made of the quantity, character and value of the work, agreeably to the terms of the agreement, when the balance appearing to be due to

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said Kidwell was to be paid to him upon his releasing the company from all claims or demands growing out of the agreement. And it was agreed that the said monthly and final estimates should be conclusive between the parties to the contract, unless the engineer of location and construction might deem it proper at any time to review and alter the monthly or final estimates of said agent; in which event the estimate of the said engineer was to be substituted in place of the estimate of the agent: It was, however, to be wholly optional with the engineer to exercise such power of revision or not.

It was further agreed, that should the company be delayed by legal process, (or from want of funds, caused by an inability to procure payment of the subscriptions made by the state of Maryland and the city of Baltimore to the capital stock of said company, &c.) from prosecuting the work, &c., operating to delay or hinder the completion of the work of said Kidwell, such delay or hindrance should not give him any claim to damages against the company, but should entitle him to such an extension of the time allowed for the completion of the work as should, in the opinion of the engineer of location and construction, compensate for such delay or hindrance. And should such delay or hindrance amount to such an interference with the work that the company should see fit to annul the agreement, the said Kidwell should be entitled to be paid the full amount of the work actually done by him under the agreement, according to its tenor, and no more.

And it was further agreed, that in case the said Kidwell should not perform all the terms stipulated to be performed by him, in manner and form, and within the time mentioned in the contract; or in case it should appear to said agent that the work did not progress with sufficient speed; or in case of interference with

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said work by legal proceedings ; the said agent should have power to annul the contract, &c. ; when the agreement on the part of the company should become null, and the unpaid part of the value of the work done, (unless the contract should be annulled in consequence of legal proceedings,) should be forfeited by the said Kidwell, and become the property of the company ; and the said company should be at liberty to employ any person in the place and stead of said Kidwell.

Annexed to the said contract, as part thereof, is a paper entitled, "Manner and condition according to which the work must be bid for and executed." In this paper it is, among other things, stipulated as follows: "The bridge is to be built of large sized, hard and durable stone, *with good natural beds*, undressed, except the corner and coping stones, which shall be rough hammered."—"The foundation to be placed upon solid rock, timber, or other material, as may be directed by the engineer ; and all the work, both under and above water, except in the cases mentioned below, to be laid without mortar, and with large stone *well bedded and bonded*. The piers " "shall be laid in good mortar made with common lime, above the low water line."—"The preceding general description " "will be subject to modification, &c."—"The bids per perch of twenty-five cubic feet, for bridge and culvert work and dry walling, will include cost of digging and draining foundations, scaffolding, centring, and all other expenses necessary to the completion of the masonry according to the plans."—"The wooden superstructures to be built of white or yellow pine timber, as the one or the other may be most cheaply obtained, of the best quality, with a few sticks of white oak in each truss frame, according to the plan exhibited in the drawings and models in the company's office in Baltimore. The cast and wrought

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iron of the skew-backs, bolts, &c., to be of good quality, free from all flaws and other defects, and submitted to such tests as the engineer may require. The bid for the superstructures to be by the running foot, and to include scaffolding, materials and workmanship of every kind, excepting painting the bridge and laying the track on the floor."—"The quantities of masonry and bridging, as here stated, may be changed, at the pleasure of the engineer, by alterations in the grades, curves, or plans of any part of the work, and the calculations of quantities will be made anew for final settlement with the contractors; it being understood that if by such changes the average haul of materials is lengthened, or the difficulties of the work are considerably increased, the contractor shall be equitably allowed therefor by the engineer."—"The whole work shall be done under the superintendence of the engineer, in accordance with the plans which will be furnished."

On the 10th of December 1849 the appellant made a contract with the appellees for the construction of a bridge across the north branch of the Potomac river: which contract was similar to the one before mentioned, except that the work was to be completed on or before the first day of January 1841, and the price to be paid for it was four dollars and ninety-four cents (instead of four dollars) per perch for the stone work, and twenty-five dollars (instead of twenty-three dollars) per lineal foot for the superstructure. The estimated quantity of materials required for each bridge was stated in the contracts respectively, and of course very much varied; the bridge across the north branch being much longer than that across the Little Cacapon.

The bridges seem to have been commenced shortly after the contracts were entered into respectively; but not to have been completed until June 1842. During the progress of the work monthly estimates and pay-

ments were made, and when the work was completed and accepted final estimates were made, according to the terms of the contracts; from which final estimates it appeared that the value of the work done—

On the North Branch bridge was	-	49,388	41
On the Little Cacapon bridge was	-	8,649	70

Making together,	-	-	-	-	\$58,038	11
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After the final estimates were made, the company appear to have been always ready and willing to pay the balance due thereon to Kidwell, who, however, received only a portion of the said balance.

On the 25th of June 1842 Kidwell exhibited his bill in chancery against the company in the Circuit court of Hampshire, complaining that the agents of the company, to whom such power was reserved, frequently and materially varied the manner, quantity, quality and finish of the work which he had contracted to do; sometimes requiring him to pull down parts of the work after the same was built according to the instructions of the resident engineer, or engineer of the division; sometimes requiring additional work not contemplated by the terms of the contracts; requiring mortared masonry instead of dry masonry; and especially and most essentially, in requiring him to make ranged and dressed work masonry instead of plain natural bedding, and to furnish and use, in the rock masonry on both bridges, cement lime instead of common lime, and in many other respects exacting of him labor and expense not contemplated by the contracts; all of which would be seen by reference to exhibits No. 3 and No. 4, filed with the bill: Also complaining that in the progress of the work the company refused to pay him the monthly estimates, made by their engineer and agent, in par funds, but required him to receive, and his necessities often compelled him to accept, what is commonly called railroad orders, as so

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much money; and that the company, by its officers and agents, charged with the duty of making the monthly estimates, did not make them according to the value of the work done and materials furnished, but according to the contract, or what should have been the contract prices if no alterations had been made in the manner in which the work was to have been done: And claiming that the company were indebted to him in a very large amount, for extra work done as aforesaid, deficiency in the monthly estimates, and loss upon railroad orders, with interest thereon: And praying for suitable specific and general relief.

In September 1842 the defendants filed their answer; in which they say that upon the completion of the work the final estimates were made up by the engineer or agent designated for that purpose in the contracts; that at the time they were made up the complainant expressed himself fully satisfied with the same and the different items thereof; and that by the terms of the contracts the said estimates are conclusive between the parties. The defendants then respond to the different items of the complainant's claim, as set forth in his said exhibits Nos. 3 and 4. In regard to the principal item of the claim, to wit, for the masonry, charged in the said exhibits at nine dollars per perch, instead of the contract prices of four dollars and four dollars and ninety-four cents per perch, making a difference in this single item of thirty-one thousand three hundred and thirteen dollars and twelve cents, the defendants say that in whatsoever respect this masonry varies from the specifications in the contract, it was not varied by directions of the engineer of the defendants, but of choice by the complainant himself, in order to avoid complying with the specifications. The contractor was bound by the contract to furnish stone with good natural beds, and that was all the defendants wanted. When he did not get

stone with good natural beds, he was offered the alternative to dress them; which he accepted and assented to, without complaining to any of the engineers of the defendants; and the variations from the specifications were thus permitted for the accommodation of the complainant himself. In regard to the next largest item of the claim, about which there is any controversy, to wit, for laying three thousand seven hundred and eighty-seven perch of stone in cement mortar, at one dollar per perch, the defendants say that the cement mortar was used by the complainant to avoid the expense of obtaining stone with good natural beds, or dressing the beds of the stone to bring them within his specifications. The cost of dressing the beds, if the stone be rough, is greatly lessened by the use of the cement mortar; and in this instance the expense to the contractor was greatly lessened. The saving in the dressing of the beds much more than countervails the expense of mixing and using the mortar.

In regard to the last item of the claim, to wit, for loss on city stock, two hundred and thirty-one dollars: The defendants say that they had power to annul the agreement, provided the want of funds prevented them from prosecuting the work; that they would have been unable to prosecute the work unless the contractors would agree to receive the stock orders of the city of Baltimore in payment of their estimates; and that this fact was communicated to the contractors, including the complainant, who agreed to receive, and did receive, the said orders in payment of his demands against the defendants. They aver that the final estimates were made up with the complainant's assent and co-operation; that he brought his bills and papers to the railroad office in Cumberland, to enable the engineers to make such equitable allowances as they were empowered under the contracts to make, in

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order to attain evenhanded justice between the parties in matters which could not be foreseen; and that the engineers made the allowances, many of them at the suggestion of the complainant, who signified his acquiescence in them, and said he had no objection to anything the engineers had done, but, on the contrary, assured them of his full satisfaction with all their conduct. But had the complainant not thus assented to the allowances made to him, the defendants insist that, by the express provisions of the contracts, the allowances thus made are final and conclusive between the parties, unless the complainant can show mistake or fraud on the part of the engineers; which the defendants presume will not be attempted.

Finally, they insist that the complainant is entitled to nothing more than is allowed in the final estimates; and for that amount they say they are, and always have been, willing to settle.

In June 1843 the complainant filed an amended bill, in which, among other things, he stated that before and at the time the bids were made, upon which the contracts were based, the said company, by their agents and officers, declared that suitable materials for the erection of the bridges which would be required to be built were to be had convenient to the line of the road and the sites of said bridges; that such declarations were made to the public and to the bidders to induce them to offer for the work at low rates; yet when the stone for the masonry was being procured, that said agents condemned it as unsuitable for the masonry of the bridges contracted for by the complainant, unless first hammered and dressed and prepared at great labor and expense to him; and when so prepared, said company have failed and refused to make him any allowance for the labor and expense thus exacted of him: which course of proceeding, he charged, was calculated to deceive and mislead, and did in fact

deceive and mislead him, and was a gross fraud upon him, if, as said defendants contend, under the stipulations of said contract, the complainant is not entitled to receive additional compensation for having, under the orders of the officers and agents of said company, put up "ranged work," instead of "rubble work," for which he bid and contracted. The complainant further charged, that at the time of the making of the contracts, and during the progress of the work, Atkinson, the agent, and Latrobe, the engineer of location and construction, were stockholders of said company, and consequently not impartial or disinterested; that complainant was not aware of that fact, nor that during the progress of the work said Latrobe would be such engineer, or said Atkinson would be the agent having charge of the work; that the defendants did not give him this information, as they ought to have done; and that he was advised that for this reason alone, if no others existed, the said estimates cannot be binding and conclusive upon him.

In September 1843 the defendants filed their answer, in which, among other things, they admit that said Latrobe, at the time of entering into the contract by the complainant, was a stockholder in the said company; but deny that he was so at the time the final estimates were made up for the building of the said bridges; and also deny that the said Atkinson, the engineer having charge of the work during the whole time it was in progress, and whose duty it was to make the monthly and final estimates, ever was a stockholder in said company. They aver that the complainant, at the time he entered into the contracts, knew that said Atkinson was the engineer who would have charge of the work, and that said Latrobe was and would be the engineer of location and construction. They deny that they did, by their agents and officers, state that suitable materials for the erection of

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the bridges were to be had convenient to the line of the road and the sites of the bridges. And they positively deny that any misrepresentation, deceit, or fraud, in reference to the stone for said bridges, or to any other matter connected with the said contracts, was practiced upon the complainant by the defendants, or any of their agents or engineers.

A great many depositions were taken in the case, but they are sufficiently noticed in the opinion which follows.

An interlocutory decree was pronounced in the case on the 11th of September 1844, and another on the 12th of April 1845; and a final decree on the 30th of December 1845. By these decrees the court, being of opinion that the final estimates or certificates of completion of the two bridges in controversy, as made out by the engineer of the said company and filed in the cause, are, under the terms of the contracts, final and conclusive between the parties as to the work done and materials furnished under the provisions of said contracts"; and being also of opinion that the complainant was entitled to no relief as to the charge in the bill that a portion of the amount paid to him upon these contracts was paid in depreciated stock orders of the city of Baltimore, it appearing to the court that such payments were made with his consent, and that there was no sufficient proof in the cause that the said company, as to this transaction, acted *mala fide*, decreed that the complainant recover against the defendants eight thousand five hundred and eighty-seven dollars and fifty-eight cents, (being the balance ascertained to be due on account of the said final estimates,) with legal interest on eight thousand five hundred and fifty-nine dollars and five cents, part thereof, from the 10th of April 1845 till paid, and that each party pay his own costs. From these decrees the complainant obtained an appeal.

Grattan and Fry, for the appellant.

Andrew Hunter, for the appellees.

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MONCURE, *J.*, after stating the case, proceeded :

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The principal subject of controversy in this case is the amount of compensation to which the appellant is entitled for the masonry of the two bridges made by him for the appellees. He charges nine dollars per perch for dressing, ranging and laying the stone, besides making other charges connected with the masonry; whereas the price stipulated in the contracts and allowed in the final estimates, for the entire masonry, is four dollars per perch for that of one of the bridges, and four dollars and ninety-four cents for that of the other. The difference between the amount charged by him and the amount allowed in the final estimates for the masonry is upwards of thirty-five thousand dollars.

The appellant contends that the masonry required by the contracts was "rubble work," whereas he was required by the appellees to do, and accordingly did do, "ranged rock work"; that though the contracts required that the stone should have "good natural beds," and be "well bedded and bonded," yet those terms should be construed in reference to all the surrounding circumstances, and especially in reference to the quarries in the neighborhood of the bridges, and the nature and quality of the stone they afforded; that the stone of which the bridges were constructed had "good natural beds," and might have been "well bedded and bonded," within the meaning of the contracts, by the use of the hammer merely; that if the work required by the contracts to be done was worth four dollars and four dollars and ninety-four cents per perch, the work required by the appellees to be done, and actually done, was, in the same proportion, worth nine dollars per perch, and that there-

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fore he is entitled to the latter price. On the other hand, the appellees contend that the stone of which the bridges were constructed had not "good natural beds," and could not have been "well bedded and bonded," within the meaning of the contract, by the use of the hammer merely; that they had a right to require, and only required, the work to be done according to the contracts, but as it could not be done with the stone which was used, they were willing that it might be done in the manner in which it was done; that the change in the manner of doing the work was no benefit to them, but an accommodation to the appellant, who was thereby enabled to do it on better terms than he could have done it according to the contracts; that he assented to the change, and did not complain of it to any of the engineers; that the work actually done was but "rubble work," though of a superior quality, and was not worth more than the contract prices; and that therefore he is entitled only to the contract prices.

The evidence is very conflicting as to the meaning of the technical terms used in the contracts, the character of the work thereby required, and the character and value of the work actually done. It would be difficult for the court to decide upon this evidence without the aid of a commissioner or a jury: But it is unnecessary in this case to do so. The appellees presented to the appellant the alternative of doing the work according to their construction of the contracts, or of doing it as it actually was done; and he elected the latter. He knew that they considered him to be doing the work at the contract prices; and yet during the whole progress of the work, which continued for about two and a half years, he never gave them notice that he would claim a higher compensation. On the contrary, he received from time to time, without objection, the amounts awarded him

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in the monthly estimates, though in all of them the work done was charged at the contract prices. Edgerton, a resident engineer, proves that he had a conversation on the subject with the appellant soon after the work was commenced. The appellant "frequently alluded to the character of the work as being superior to what he was required to do by the contract. He was repeatedly told, if he thought so, to discontinue the work until the question could be settled; to do no more until that matter should be finally settled." Atkinson, the division engineer, proves that the appellant never complained to him that he was required to do the work in a different style from that required by the contracts; on the contrary, deponent, being told that appellant was complaining to others, asked him if he had any complaint, and he answered very positively that he would never have any controversy with deponent. Latrobe, the engineer of location and construction, proves that if he had been apprised of any intention on the part of the appellant to demand extra compensation for his work, he would immediately have had a communication with him on the subject, and have taken measures to put an end to any such expectations. Deponent is satisfied that at the time the appellant got fairly under way with his job, which was in the summer of 1840, he (the deponent) could have procured the work to be done precisely in the style in which the appellant then proposed to do it, and has since done it, at a price not exceeding that of his contract.

Under all these circumstances, I am of opinion that, whatever may be the true construction of the contracts, the appellant acquiesced in the construction placed upon them by the appellees, and is concluded by such acquiescence from claiming a higher compensation for the masonry than the prices stipulated for in the contracts, and allowed in the final estimates.

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I am also of opinion that the final estimates are conclusive not only in regard to the masonry, but also in regard to all other items of the appellant's claim, except two items of small amount, which will be hereafter noticed. The contracts expressly provided, that when the work was completed and accepted, final estimates should be made by the agent of the company, of the quantity, character and value of the work, agreeable to the terms of the contracts, which final estimates should be conclusive between the parties, unless reviewed and altered by the engineer of location and construction; and that the balance appearing to be due to the contractor should be paid to him upon his giving a release to the company of all claims or demands whatsoever, growing in any manner out of the agreement. The final estimates were made according to the contracts, and have not been reviewed and altered by the engineer of location and construction: Why, then, are they not conclusive? The counsel for the appellant contended that such provisions are against the policy of the common law, and have a tendency to exclude the jurisdiction of the courts, which are provided by the government with ample means to entertain and decide all legal controversies. Story on Partn., § 215, and cases cited in the notes. The doctrine relied on refers to agreements to refer disputes to arbitration; such as a stipulation, usually inserted in articles of partnership, that disputes and controversies between the partners shall be referred to arbitrators named in the articles, or to be named by the respective partners. It may well be questioned whether the provisions of the contracts in this case for the final estimates come within the influence of the doctrine relied on. They seem to stand on higher ground than mere agreements for future reference; and to be substantial and irrevocable parts of the contracts in which they are embodied. But waiving the decision of that

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question, and conceding, for the purposes of this case, that these provisions are in effect agreements for future reference, and are governed by the doctrine referred to, I am still of opinion that the final estimates are conclusive. "The maxim often quoted, says Russell on Arbitration 103, 104, 63 Law Libr., that an agreement to refer is not binding, and cannot deprive the court of its jurisdiction, seems sometimes to have been misunderstood."—"In one sense, it is true, such an agreement may be said not to be binding, for it cannot be pleaded in bar to an action in respect of the matters intended to be referred, and so does not oust the court of its jurisdiction"; and it is very clear that equity will not specifically enforce it. "But in another sense it is binding, for there is nothing illegal in such a contract; and when it is acted on, and an award has been made, the jurisdiction of the courts over the matter decided by the arbitrator is gone, and all that the court have to say is, whether the award is good or not." *Wellington v. Mackintosh*, 2 Atk. R. 569; *Hill v. Hollister*, 1 Wils. R. 129; *Halfhide v. Fenning*, 2 Br. C. C. 336; *Mitchell v. Harris*, 2 Ves. jr. R. 129; *Thompson v. Charnock*, 8 T. R. 139; *Street v. Rigby*, 6 Ves. R. 815; *Waters v. Taylor*, 15 Id. 10; *Cleworth v. Pickford*, 7 Mees. & Welsb. 313, Lord Abinger, C. B. See the American cases cited in 2 Bro. C. C. 270, note (a), Perkins' edition.

According to the doctrine as thus laid down, even if the final estimates had been made without any co-operation on the part of the appellant, or further assent from him than was given by his becoming a party to the contracts, they would have had the effect of final awards, and been conclusive as such. In this case the appellant not only made no objection to the action of the agent in making the final estimates, nor any attempt to revoke his powers to make them, but actually appeared and exhibited his claims against the

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company before the engineer, who allowed some and rejected others, in whole or in part; and the appellant seemed at first to acquiesce in the final estimates which were made. These estimates were made by the resident engineers, with the concurrence of the division engineer. Edgerton, the resident engineer at the North Branch bridge, says that the appellant never expressed any dissatisfaction with the monthly estimates, and when deponent gave him a copy of the final estimate he appeared to be fully satisfied with it, as far as deponent was concerned, and expressed his assent to all the particulars therein. Chiffelle, the resident engineer at the Little Cacapon bridge, says that in making out the final estimate the most liberal allowance which truth and equity could have dictated was made to the appellant. Atkinson, the division engineer, says that he never heard the appellant make any specific objection to any of the monthly or final estimates. Appellant sometimes asked if the company could not allow more. With regard to the final estimates, deponent took particular care to learn his views, made all the allowances that were required, and supposed he had removed all grounds of complaint, and had made the estimates satisfactory. In order to make up the final estimates and remove all sources of complaint, deponent requested the appellant to remain and come to deponent's office in Cumberland, and give deponent notice of all extra work that he supposed he had done on the bridges, or under any other head, for the company, for which he had not been already paid. In consequence of this request, the appellant did remain in Cumberland, calling at deponent's office frequently while the latter was engaged in making up the items, answering such questions as were asked him, and by his conduct satisfying deponent that he considered every ground of complaint was removed. Deponent's reason for requesting the appellant to be

present was, that under such extensive contracts extra charges which were equitable might possibly escape the notice of the engineers, and that deponent wished the appellant to suggest such, if any there were; told him this was deponent's design, and had the benefit of his suggestions accordingly. Has no recollection that he objected to any of the items. When deponent handed him the final estimate of the North Branch bridge—i. e., the amount made up in dollars—the appellant said, good naturedly, as deponent supposed, "Is that all?" The impression made on deponent's mind was that he was going to the office to receive the balance due him according to the estimate.

Some of the testimony of the appellant is to some extent in conflict with the foregoing testimony of the appellees, but does not materially alter the case. Better's testimony tends to prove that the resident engineer, Edgerton, obtained from the appellant bills only for such extra work as was occasioned by the mistakes of the engineer, and not for all the extra work. But A. G. Kidwell says that he took a great many of the bills for extra work to the engineers. They received a part, rejected a part, and curtailed the amount of a good many of the bills. Edgerton made out the final estimate, and showed it to the appellant in deponent's presence. The appellant complained of a good many of the amounts not being large enough, and asked if they were not going to allow for laying the masonry in cement mortar, and cutting and dressing the stone. Mr. Atkinson said he could not allow it, because Mr. Latrobe told him he would not allow it. Davis says, Mr. Atkinson showed the final estimate to the appellant in the presence of deponent, in the railroad office in Baltimore; thinks it was upwards of eleven thousand dollars. Appellant asked Atkinson if that was all he was going to do for him. Atkinson said, "Yes, and you may be thankful to get that"; and appellant said he would not take it.

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From all the testimony on both sides, it is manifest that the appellant submitted all his claims arising out of the contracts, or on account of the work done by him for the company, to the consideration and decision of the engineer: And upon every principle of law or equity which is applicable to the case, I think the final estimates of the engineer are conclusive, unless they can be avoided on the ground of fraud or mistake. Has fraud or mistake been shown? is therefore the question next to be considered.

In neither of the bills, original or amended, is any fraud imputed to the engineers in making the final estimates. The original bill contains no allegation of any fraud whatever. The amended bill seems to have been filed mainly with the view of supplying this defect; and charges, in effect, that before and at the time the bids were made upon which the contracts were based, the said company, by their agents and officers, falsely and fraudulently represented to the public and to the bidders, to induce them to offer for work at low rates, that suitable materials for the erection of the bridges were to be had convenient to the line of the road and the sites of the bridges. This charge is positively denied in the answer to the amended bill, and is unsustained by any evidence whatever.

The amended bill also charges that when the contracts were made, and during the progress of the work, Latrobe and Atkinson were stockholders of the company, and therefore not impartial or disinterested; that the appellees did not inform the appellant of this fact, as they ought to have done; and that he was not aware of it. The appellees in their answer admit that Latrobe was a stockholder when the contracts were made; but deny that he was one when the final estimates were made, or that Atkinson ever was one. The answer on this subject is sustained by the evidence; except that Atkinson says he has had a few shares of

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stock at different times, but had none, he believes, while the North Branch bridge was in progress. The only stock held by him since 1838 was three shares held in trust for another, for not more than a year, and then sold in November 1842.

The final estimates, as before stated, were made by the resident engineers, and concurred in by Atkinson, the division engineer. I do not think their validity is affected by the fact that when they were made Latrobe had been a stockholder, and Atkinson was a stockholder in the character of trustee for another, without having himself any interest in the subject. Whether, if they had been made by an engineer who, at the time of making them, was a stockholder in his own right, they would have been invalid merely on that ground, and in the absence of fraud, is a question which does not arise, and is therefore not intended to be decided.

The answer to the amended bill positively denies fraud of any kind on the part of the company, their agents and officers, and the evidence affords no proof of any such fraud in the transaction.

As to the ground of mistake: If either of the bills contains any charge, certainly the evidence affords no proof of any such mistake on the part of the engineers as can invalidate their final estimates. There is no mistake of law or fact apparent upon the face of the estimates; and the engineers who made them testify that all the claims of the appellant against the company, on account of the bridges, which were just and right, were allowed therein.

On this subject, see 2 Story's Eq. Jur., § 1453-4-5 and 6, and Russell on Arbitration 242 *et seq.*, 63 Law Libr.

The final estimates were intended by the parties to be, and are, conclusive in regard to all work done and materials furnished by the appellant in the construction of the bridges, including all extra work. In this

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respect the case differs from that of *Dubois v. The Delaware & Hudson Canal Company*, 12 Wend. R. 334, relied on by the appellant's counsel. All the items of the appellant's claim in this suit appear to be for work done by him in the construction of the bridges, except two items of small amount, before referred to. One of these is for building two cattle stops; and is proved to have been paid. The other is for loss on city stock; for which, I think, the appellees are not responsible, the appellant having agreed to receive the stock at par.

I think there is no error in the decrees for which they ought to be reversed, and am for affirming them.

The other judges concurred in the opinion of *Moncure, J.*

DECREE AFFIRMED.

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1. Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprietor of the stage; and they are bound to use the utmost care and diligence of cautious persons to prevent injury to the passengers.
2. Where a passenger is injured by the upsetting of the coach, the presumption is that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach, to show that there was no negligence whatsoever.
3. Though the proprietors of the coach may show that it was reasonably strong, with suitable harness, trappings and equipments, of sufficient strength and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet, if the upsetting of the coach is caused by the running off of the horses, and such running off of the horses might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable for the injuries sustained by a passenger.
4. If the coach is upset by the running off of the horses, and if they ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the running off of the horses might have been prevented if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, the proprietors are liable.
5. Carriers of passengers by stages are bound to provide not only good coaches, harness, &c., of the kind used on their line, but they are bound to provide such as will best secure the safety of the passengers.
6. If the coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach.
7. In actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of the damages must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

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This was an action on the case in the Circuit court of Shenandoah county by John Reigle against William Farish & Co., stage owners, to recover damages for an injury sustained by the plaintiff by the upsetting of the defendants' stage. The plaintiff, who lived in Pennsylvania, took a passage in the defendants' stage to go from Staunton to Winchester; and he proved that after leaving Woodstock, a short distance below that town, the stage was turned over, and he was very much injured; his head was severely cut, and one of his legs was broken immediately above the ankle, the small bone having passed through the muscles of the leg, and also through his boot and clothes. He was confined at a house near the place of the accident for six months, during which time he suffered very severely, and for a part of the time was occasionally delirious. At the time of the trial, which was a year after the occurrence, his leg was not entirely healed, and was shortened, the ankle joint was swollen and stiff, and he was obliged to use crutches; and the physician who attended him expressed the opinion that the joint would continue to be stiff, and he would be a cripple for life. He was also subjected to considerable expense; having paid his physician's bill of two hundred and eighty dollars, and to the man at whose house he was confined one hundred and fifty-four dollars and twelve cents.

The defendants proved that the stage used on the occasion was a good one, and the gearing was good of its kind. The horses were also proved to be steady, and the driver a very good, prudent and careful driver, and a perfectly sober man. He was examined as a witness. He stated that he took charge of the stage at Red Banks, nine miles above Woodstock; that he then looked at the blocks in the brake, and was satisfied they were in their proper position; and they held well and worked well from thence to Woodstock.

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The passengers dined at Woodstock ; and he there looked at the blocks again, to see if they were in proper condition, but he did not at either place strike them with his hatchet, which it is the general habit to carry along with them for the purpose of fixing the blocks when they require it ; nor did he take hold of them. A short distance from Woodstock the road descends for some distance. When he went to use the brake at the hill, he found that the blocks were out. It appears from the evidence that the running of the stage on the horses frightened them, and they commenced to run ; and for some part of the way over which they ran, and at the place where the stage was upset, there was a precipice on the right side of the road, and a hill on the left. The driver described his efforts to stop the horses, in which he failed. He said that he then tried to keep the middle of the road, hoping to be able to pull up on reaching a hill before him ; but that the hind wheels of the coach began to slip, and were nearly over the precipice ; and whilst he was endeavoring to avoid it, the coach was upset. He stated further that the stage, in going down the hill and around the turns, rocked very much from side to side, and just before turning over on the left, had been strongly tilted to the right, and, falling back, tilted the other way, and seemed to him to have been for some distance on the left wheels before it went entirely over. He stated further that he had no occasion to use the brake after he left Woodstock until he commenced descending the hill, and made no experiments to ascertain if the blocks were still in. The first time he attempted to use the blocks, he found they were both out. This was about half a mile or a little more from the tavern in Woodstock.

The witness had no recollection as to the amount of the baggage on the top of the stage, or the number or size of the trunks. He found it all on and under the

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canvas when he took charge of the coach, and had no occasion to examine or handle it. It appeared that there were nine passengers inside the coach; the plaintiff was sitting with the driver, and there was a negro man on top. At the place where the coach was upset the road was smooth, though it was descending.

The plaintiff proved that there was no breeching on the horses; and one witness introduced by him, who was from Maryland or Pennsylvania, stated that he had been from a boy engaged in staging, and had quit the business about ten years before the trial; that he considered it unsafe to rely upon the brake alone, without breeching on the horses; that breeching was used on the National road. Several witnesses were introduced by the defendants, who stated that they had been engaged in the business of staging for from eighteen to thirty years, some of them in Virginia, and two in Virginia, North and South Carolina, and Georgia; that breeching was of no advantage where the brake was used, and that since the introduction of brakes breeching had been abandoned. One of them stated that economy was not the object in dispensing with breeching; that they had sometimes received harness from the manufacturer at the north with breeching, and had taken it off and hung it up as surplus harness. This witness further stated that the blocks would bounce out in very dry weather.

After the evidence had been introduced, the plaintiff moved the court to instruct the jury:

1. That passenger carriers are liable for injuries resulting even from the slightest negligence on the part of the coachman or proprietor of the stage, and that they are bound to use the utmost care and diligence of cautious persons to prevent injury to passengers.

2. That if the jury believe from the evidence that the plaintiff was injured by the overturning of the coach, the *prima facie* presumption is that it occurred

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by the negligence of the coachman, and the burden of proof is on the proprietors of the coach, to establish that there was no negligence whatsoever; and that although this *prima facie* presumption may be repelled by defendants proving that the coach was reasonably strong, with suitable harness, trappings and equipments, of sufficient strength and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet, if the jury believe from all the evidence that the running off of the horses caused the overturning of the coach, and that such running off of the horses might have been arrested if the utmost care and diligence of very cautious persons had been exercised, that then the defendants are liable in damages to the plaintiff.

3. If the jury believe that the plaintiff was injured by the upsetting of the stage, and that the upsetting was caused by the horses running off; that the horses ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the jury further believe that such running off of the horses might have been prevented if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, that then the defendants are liable in damages.

4. If the jury believe that the coach was upset in consequence of having too much baggage on the top of the coach, that the defendants are liable for the injury sustained by the plaintiff because of such upsetting.

The court gave the 1st, 2d and 4th instructions without alteration, and also gave the 3d instruction, accompanied by the remark to the jury that, in speaking of the horses being "properly harnessed," the

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court must not be understood to express any opinion whether the horses should have breeching or not, for that upon that subject he would express no opinion, leaving it entirely to the jury as a question proper for their decision.

The court also gave to the jury the two following instructions, asked for by the defendants :

1. In the absence of any express or special contract, the proprietors of stage coaches for the transportation of passengers are not bound to guarantee, as to their coaches, harness and fixtures, more than that they shall be sound and complete of the kind used upon their line, and offered to the patronage of travelers. And they cannot be charged with damages resulting, without negligence, from the nonadoption of another kind or style of conveyance, harness or fixtures.

2. In ascertaining whether the injury in this case resulted from negligence or want of due precaution upon the part of the driver, the jury are bound to consider his conduct according to the rules which prevail in like cases among the most prudent, discreet and skillful drivers ; and if they are satisfied that he used every precaution which experience has established as sufficient under the circumstances, they will attach no responsibility to the defendants because of an unforeseen and improbable accident.

To the giving of all and each of the said instructions asked for by the plaintiff, and to the instruction contained in the remark of the court above stated, the defendants, by counsel, excepted.

There was a verdict and judgment for the plaintiff for nine thousand dollars ; and a motion for a new trial by the defendants, on the grounds that the verdict was contrary to the evidence, and that the damages were excessive ; which was overruled by the court ; and the defendants again excepted : But the exception, instead

of stating the facts proved, gave the evidence of the different witnesses. Upon application to this court by the defendants, a *supersedeas* to the judgment was awarded.

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Michie and *Baldwin*, for the appellant, insisted :

1. That the ground on which a carrier of passengers was held responsible for injuries sustained by them is negligence. And they referred to *Aston v. Heaven*, 2 Esp. R. 533; *Christie v. Griggs*, 2 Camp. R. 79; *Jones v. Boyce*, 2 Eng. C. L. R. 482; *Jackson v. Tollett*, 3 Eng. C. L. R. 233; *Crofts v. Waterhouse*, 11 Eng. C. L. R. 119; *Bremner v. Williams*, Id. 437; *Harris v. Costar*, Id. 505; *Curtis v. Drinkwater*, 22 Id. 51; *Sharp v. Grey*, 23 Id. 331; *Ware v. Gay*, 11 Pick. 106; *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. R. 611; *Boyce v. Anderson*, 2 Peters' R. 150.

2. That the principle applicable to carriers of passengers is that applicable to bailees for hire; and therefore they are responsible for only ordinary neglect. And they referred to the cases before cited, especially *Boyce v. Anderson*, 2 Peters' R. 150. This was a case of a carrier of slaves; and they said the Supreme court held that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods; that the carrier was answerable for injury sustained in consequence of his negligence or want of skill, but no further. And that the court recognized the rule laid down in *Jones on Bailments* as applicable to bailees for hire: That they are responsible for no more than ordinary neglect.

3. That ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns. Angell on Carr., p. 47, § 45, note 3; p. 49, § 47. That this being the criterion by which the conduct of the carriers and their agents was to be

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measured, it was clear the first and second instructions given upon the motion of the plaintiff were erroneous. And they insisted that the fourth instruction had no reference to any evidence in the cause, and was therefore erroneous.

4. That the third instruction given on the motion of the plaintiff was directly in conflict with the first instruction given on the motion of the defendant. They insisted that the latter was correct; that all that could be required of the carrier, even upon the harshest principles that had been applied to them, is that their coaches, harness and fixtures shall be sound and complete of the kind used upon their line, and offered to the patronage of travelers.

The counsel took up the question upon principle, and insisted that, as it was an open question in this state, sound principle and sound policy forbade the adoption of the very harsh rule which had been acted on in some of the cases elsewhere—a rule which seemed to look upon carriers of passengers as criminals to be punished, not as useful citizens, to be encouraged and protected.

G. N. Johnson, for the appellees :

1. Proprietors of stage coaches are liable for the misconduct or neglect of their drivers, and for defects of their coaches, harness and other equipments. Angell on Carr., § 534, 540; Story on Bailments, § 592, 593, 596; and almost all the cases cited under the other heads.

2. Carriers of passengers for hire are liable for the smallest negligence, and bound for the utmost diligence in regard to everything connected with the safety of the passengers. Angell on Carr., § 540; Story on Bailments, § 598, 601, 602; *Aston v. Heaven*, 2 Esp. N. P. R. 533; *Christie v. Griggs*, 2 Camp. R. 79; *Jackson v. Tollett*, 3 Eng. C. L. R. 233; *Crofts v. Waterhouse*, 11

Eng. C. L. R. 119; *Sharp v. Grey*, 23 Eng. C. L. R. 331; *Stokes v. Saltonstall*, 13 Peters' R. 181; *Hall v. Connecticut River Steamboat Co.*, 13 Conn. R. 319; *Derwort v. Loomer*, 21 Conn. R. 245; *Ingalls v. Bills*, 9 Metc. R. 1; *Peck & wife v. Neil*, 3 McLean's R. 22—a case in Queen's Bench, Montreal, stated in note to Angell on Carr., p. 520, § 541.

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And in connection with the above cited cases of *Christie v. Griggs* and *Sharp v. Grey*, which relate chiefly to the land-worthiness of the coach and its equipments, see *Israel v. Clark*, 4 Esp. R. 259, and *Bremner v. Williams*, 11 Eng. C. L. R. 437.

3. It is the duty of such carriers and their agents, especially the driver, to make frequent, careful and thorough inspections, to ascertain that all is right. *Bremner v. Williams*, 11 Eng. C. L. R. 437; Angell on Carr., § 535; *Christie v. Griggs*, 2 Camp. R. 79; *Sharp v. Grey*, 23 Eng. C. L. R. 331; *Ware v. Gay*, 11 Pick. R. 106; *Ingalls v. Bills*, 9 Metc. R. 1.

4. It is the duty of drivers to warn passengers when there is danger. Story on Bail. 377, § 598; *Dudley v. Smith*, 1 Camp. R. 167; *Stokes v. Saltonstall*, 13 Peters' R. 181; *Derwort v. Loomer*, 21 Conn. R. 245.

5. If the coach is overloaded with passengers or baggage, &c., and that may have caused the injury to the plaintiff, the defendant is liable. Angell on Carr., § 537; Story on Bail., § 594; *Aston v. Heaven*, 2 Esp. R. 533; *Israel v. Clark*, 4 Esp. R. 259; *Curtis v. Drinkwater*, 22 Eng. C. L. R. 51.

6. The breaking down or overturning of the coach is *prima facie* evidence of negligence. *Christie v. Griggs*, 2 Camp. R. 79; *Ware v. Gay*, 11 Pick. R. 106; *Stokes v. Saltonstall*, 13 Peters' R. 181; *Carpue v. London & Brighton Railway Co.*, 48 Eng. C. L. R. 747.

7. If any neglect of duty on the part of the driver caused the accident, it is no defence that the plaintiff

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had not done all he might have done to protect himself from danger. And whether the plaintiff's neglect or the neglect of the driver caused the accident is a question of fact for the jury. *Jones v. Boyce*, 2 Eng. C. L. R. 482; *Curtis v. Drinkwater*, 22 Eng. C. L. R. 51; *Stokes v. Saltonstall*, 13 Peters' R. 181; *Ingalls v. Bills*, 9 Met. R. 1; *Beers v. Housatonic R. R. Co.*, 19 Conn. R. 566.

8. Whether the injury is to be attributed to the negligence of the carrier or not is always a question of fact for the jury, which is left to their judgment, subject to such instructions as the court may give upon the law. See all the cases cited for the other propositions; to which may be added *Harris v. Costar*, 11 Eng. C. L. R. 505.

9. The Court of appeals will not judge, upon a question of new trial, either of the *credibility* or *weight* of the evidence. Bills of exception, in such cases, must state the facts proved, not the evidence. If, however, it does state the evidence, the Court of appeals will disregard all the evidence which makes for the exceptant; and if, by so doing, the court can ascertain the facts proved by the other evidence, and can find no evidence to justify the verdict, then, and then only, will it be set aside. *Grayson's Case*, 6 Gratt. 712; *Hill's Case*, 2 Ib. 594; *Bennett v. Hardaway*, 6 Munf. 125; *Ewing v. Ewing*, 2 Leigh 337; *Green v. Ashby*, 6 Leigh 135; *Pasley v. English*, 5 Gratt. 141.

10. Where there is no certain criterion of damages, the amount to be given rests exclusively with the jury. And this is especially true in actions for personal injuries. In such cases the court will never grant a new trial, on the ground that the damages are excessive, unless the court can *manifestly* see that the jury have been *outrageous* in giving such damages as greatly exceed the injury; such as to convince the court that the jury must have been influenced by

passion, partiality, prejudice, or corruption, or have been mistaken in the law of the case. *Wilford v. Berkeley*, 1 Burr. R. 609; *Coffin v. Coffin*, 4 Mass. R. 29; *Worster v. Proprietors of Canal Bridge*, 16 Pick. R. 541; *Payne v. Brittenham*, 1 A. K. Marsh. R. 440, 591; *Harvey v. Huggins*, 2 Bailey's So. Ca. R. 252, 268; *Park v. Hopkins*, Ibid. 408; Sedgwick on Damages, chap. 13, 1st edi., p. 369; 2d edi., p. 355. But the court uses its power to set aside verdicts in such cases sparingly and with reluctance, and never except in a very clear case. *Gilbert v. Burtenshaw*, 1 Cowp. R. 230; Sedgwick on Damages, 2d edi., 599 to 603, and cases cited there.

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DANIEL, J. In the ninth article of Judge Story's work on Bailment is to be found the most concise and lucid exposition of the rights, duties and obligations of carriers of passengers that I have met with. It is there stated that carriers of passengers merely for hire are subject to the same responsibility as carriers of goods for hire, at the common law, so far as respects the baggage of the passengers: But as to the persons of the passengers a different rule prevails. Attempts have been made to extend their responsibility as to the persons of passengers to all losses and injuries, except those arising from the act of God or from the public enemies. But the support of this doctrine has been uniformly resisted by the courts, although a strict responsibility as to the carriage of the persons of passengers is imposed upon such carriers. Section 590. In section 592 the author proceeds to state, as the result of the decided cases, that carriers of persons by stage coaches are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings and equipments; and to make a proper examination thereof previous to each journey. In other terms, that they

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are bound to provide road-worthy vehicles suitable for the safe transportation of passengers. And if they fail in any of these particulars, and any damage or injury occur to the passengers, they will be responsible to the full extent thereof. Hence (he says) it has been held that if there is any defect in the original construction of the stage coach, as, for example, in an axletree, although the defect be out of sight, and not discoverable upon a mere ordinary examination, yet, if the defect might be discovered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor.

In the next place, they are bound to provide careful drivers, of reasonable skill and good habits, for the journey; and to employ horses which are steady and not vicious, or likely to endanger the safety of their passengers. Section 593.

In the next place, they are bound not to overload the coach either with passengers or with luggage; and they are to take care that the weight is suitably adjusted, so that the coach is not top-heavy and made liable to overset. Section 594.

They are bound to make use of all the ordinary precautions for the safety of passengers on the road. The coachman must, in all cases, exercise a sound and reasonable discretion, in traveling on the road, to avoid dangers and difficulties. If he is guilty of rashness, negligence, or misconduct, or if he shows any want of skill, the proprietors will be responsible for any injury resulting from his acts. Section 598.

The liabilities of such carriers naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries, except by the act of God or by public enemies, the enquiry is naturally presented, What is the nature and extent of their responsibility? It is certain that their undertaking is

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not an undertaking absolutely to convey safely. But although they do not warrant the safety of the passengers, at all events; yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But in what manner (the author asks) are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives and limbs and health are of great importance as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem (he says) to furnish the true analogy and rule. It has been accordingly held that passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest, neglect. Section 601.

In section 601 a, the further proposition is stated, that when injury or damage happens to the passengers by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption *prima facie* is, that it occurred by the negligence of the coachman; and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof.

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This summary of the law seems to me to comprehend and to affirm all the propositions involved in the instructions given at the instance of the defendant in error.

The plaintiff in error, in his petition, denies the propriety of each of these instructions; but neither in the notes of his counsel accompanying the petition, nor in the argument here, has any serious effort been made to show, by argument or authority, that the instructions have failed to propound the law correctly, except in two particulars. In order to determine whether the instructions have erred in either of these particulars, a more special notice of the law, in relation to them, would seem to be rendered proper.

In the first place, it is urged that carriers of persons are responsible for *no more than ordinary neglect*; and that, as the instructions lay down a rule which imputes liability for a less degree of negligence than that which constitutes ordinary neglect, they have in such particular stated the law too strongly against the plaintiff in error. In support of this objection the authority mainly relied upon is the case of *Boyce v. Anderson*, 2 Peters' R. 150. That case does, I think, decide the law as the counsel for the plaintiff states it; but in the case of *Stokes v. Saltonstall*, 13 Peters' R. 181, it has been substantially, if not in terms, overruled.

Justice Barbour, in *Stokes v. Saltonstall*, in reviewing the decision in *Boyce v. Anderson*, says: "That was an action brought by the owner of slaves against the proprietors of a steamboat on the Mississippi, to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the captain and commandant of the boat. The court distinguished slaves, being human beings, from goods; and held that the doctrine as to the liability of common carriers for mere goods did not apply to them; but that, in respect to them, the carrier was responsible only for ordinary neglect. The court seem to have

considered that case as being a sort of intermediate one between goods and passengers. We think, therefore, that anything said in that case, in the reasoning of the court, must be confined in its application to that case, and does not affect the principle which we have before laid down." And in a preceding portion of the opinion the general principle is asserted that, though a carrier of passengers "does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them goes to this extent: that he, or his agent, (if, as in this case, he acts by agent,) shall possess competent skill; and that *as far as human care and foresight can go* he will transport them safely"; and the case of *Aston v. Heaven*, 2 Esp. R. 533, is cited with approbation, in which it is held that whilst the action stands on the ground of negligence, yet the responsibility attaches to the *smallest negligence*.

And in *Jackson v. Tollett*, 3 Eng. C. L. R. 233, Lord Ellenborough states the law to be, that "every person who contracts for the conveyance of others *is bound to use the utmost care and skill*"; and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences."

The case of *Crofts v. Waterhouse*, 11 Eng. C. L. R. 119, is substantially to the same effect. So in *Hall v. Conn. River Steamboat Co.*, 13 Conn. R. 319, the court held that whilst the rule applicable to carriers of goods had not been applied in its fullest extent to carriers of persons, because they have not the same absolute control over passengers that they have over goods entrusted to their care, yet that both policy and the authority of adjudged cases require great care and skillful management in the transportation of passengers by common carriers. They said it was but right it should be so; that those upon whose skill and careful management not unfrequently depend the lives and safety of others should feel themselves responsible for *any*

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want of care or faithfulness, and that they therefore fully approved the instruction given in the court below, that the defendants were bound to employ the *highest degree of care* that a reasonable man would use.

In *Stockton v. Frey*, 4 Gill. 406, and in *Maury v. Talmadge*, 2 McLean's R. 157, and in *Derwort v. Loomer*, 21 Conn. R. 245, the same doctrine is maintained. And in the case of the *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. S. C. R. 486, Justice Grier, in delivering the opinion of the Supreme court, uses the following strong and emphatic language: "When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. *Any negligence in such case may well deserve the epithet of 'gross.'*" And in Angell on the Law of Carriers it is stated, as the result of the decided cases, that "the degree of responsibility to which carriers of persons are subject is not *ordinary* care, which will make them liable only for *ordinary* neglect, but *extraordinary* care, which renders them liable for *slight* neglect. It is the danger to the public which may proceed even from slight faults, unskillfulness, or negligence of passenger carriers or their servants, and the helpless state in which passengers, by their conveyances, are, which have induced the courts, both in England and in America, to bind the rule of the contract *locatio operis* much tighter than could be insisted for on the ordinary principle of that contract. The most inconsiderable departure, therefore, from the important duties imposed upon passenger carriers will render them liable for the consequences." Indeed, I have seen no case, except that of *Boyce v. Anderson*, which sanctions

the idea that the carrier is not responsible for slight neglect; and I feel no hesitation in approving the instructions of the judge in the particular under consideration.

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The second error supposed to be committed by the judge below, in expounding the law to the jury, is to be found in the explanation accompanying the third instruction asked by the defendant in error. In the third instruction, it will have been seen, the judge instructed the jury that if they believed that the plaintiff was injured by the upsetting of the stage, and that the upsetting was caused by the horses running off; that the horses ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the jury further believed that such running off of the horses might have been prevented, if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, that the defendants were liable in damages. And the court accompanied this instruction by the remark to the jury, that, in speaking of the horses being "properly harnessed," the court was not to be understood as expressing any opinion whether the horses should have had breeching or not; for upon that subject he would express no opinion, leaving it entirely to the jury as a question proper for their decision.

And the court afterwards, at the instance of the plaintiff in error, instructed the jury that, in the absence of any express or special contract, the proprietors of stage coaches for the transportation of passengers are not bound to guarantee, as to their coaches, harness and fixtures, more than that they shall be sound and complete of the kind used upon their line, and offered to the patronage of travelers; and that they cannot be charged with damages resulting, with-

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out negligence, from the nonadoption of another kind or style of conveyance, harness, or fixtures. The defendant in error having offered the testimony of witnesses to show that, since the introduction of the brake, it was not safe to trust to that as a means of checking the velocity of stages in descending hills, with harness that had no breeching; and the plaintiff having offered evidence to show that when the brake was used the breeching to the harness was of no value as a means of safety, and that on his line, and on many other lines, the breeching had been abandoned as useless since the improvement of the brake had been introduced, it was, I think, evidently the purpose of the court, in the explanation given of the third instruction, to guard the jury against the impression that in saying if the jury believed that the running off of the horses might have been prevented if the horses had been properly harnessed, &c., the plaintiffs in error were liable, the court intended to express the opinion that the failure to use breeching to the harness did of itself constitute neglect; whilst, on the other hand, the plaintiff in error was desirous of getting rid of the testimony offered by his adversary on that head, by the instruction which he asked; the effect of which was to negative the conclusion, in law, of any neglect in failing to use the breeching, though the jury should be of opinion, from the evidence, that harness with breeching would be safer than harness without, provided they should also believe that the harness used was sound and complete, of the kind used upon the line of the plaintiffs in error.

It is insisted by the counsel of the plaintiff in error that there is an obvious conflict between the third instruction of the defendant in error, as explained by the court, and the first instruction given at the instance of the plaintiff in error; that the latter properly confined the jury to the enquiry whether the harness was sound

and complete of the kind used on the line, whilst the former left the jury at liberty to impute neglect to the plaintiff in error in failing to use harness of a different kind.

The discrepancy between the two instructions complained of does, I think, exist; and it becomes necessary to enquire which of the two instructions is right. The question as to the liability of the carrier is presented in a peculiar and novel aspect; but it will, on examination, I think, be found to fall within the influence of well settled and familiar principles.

I have already cited the authority of Judge Story to show that the carrier is bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings and equipments. And there are numerous cases stating the law the same way; and, among others, *Christie v. Griggs*, 2 Camp. R. 79; *Bremner v. Williams* 11 Eng. C. L. R. 437; *Crofts v. Waterhouse*, Ib. 119; *Sharp v. Grey*, 23 Eng. C. L. R. 331; *Stockton v. Frey*, 4 Gill's R. 406.

In the case of *Ingalls v. Bills*, 9 Metc. R. 1, the correctness of some of these decisions, so far as they go to declare the stage owner to be a warrantor of the soundness and sufficiency of the coach in all respects, is denied. And it was there held that when the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury; but the misfortune must be borne by the sufferer. Yet the court at the same time said, that the carriers of passengers are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harness, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens

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from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident.

If this case is to be regarded as establishing that a latent defect in the coach, which a careful examination would not disclose, forms an exception to the general undertaking of the carrier to furnish a sufficient coach, (about which I do not deem it necessary to express an opinion,) it is clear, I think, that this exception has no bearing on the case, and that, in expounding the law, there was nothing making it incumbent on the judge to state it. And the true point of enquiry, out of which the conflict of instructions arose, was whether an alleged defect in the harness used by the plaintiff in error, (which, if it existed, was a patent defect, consisting in the absence of a certain portion of the harness, with or without which it could be used,) was a proper matter of enquiry for the jury; and if so, whether, on their being of opinion that there was such defect, they could make it the ground for finding the plaintiff in error guilty of neglect.

If the proposition contended for by the plaintiff in error is to be received as the law, viz: that he undertakes only that his coaches, harness and fixtures shall be sound and complete of the kind used on his line, it follows that he may be excused from liability in the face of the amplest proof to show that, owing to their style or kind, they were positively dangerous. In no case that I have seen can any warrant be found for such a rule. Could it be said, in the language of the case of *Ingalls v. Bills*, that a carrier uses the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harness, &c., if it was shown that, from want of care, skill, or judgment, he

had selected for the use on his line a style of harness shown to be less safe than another which had long been in use, and which was known by him to be in use? Such a rule seems to me to alter the relative rights and duties of the carrier and passenger. The passenger, instead of relying on the carrier to use the proper care and judgment in the selection of the coach, harness, &c., with a view to its safety, would have to use the utmost diligence, whenever about to take passage, in enquiring into the style and fashion of the coach used on the line, and then to determine for himself whether or not a stage constructed after such style or fashion would or would not, probably, be safe. The law, I think, imposes no such duty on the passenger. He has, I think, a right to expect that the carrier, who has undertaken to use the greatest care and skill in providing for his safe passage, will exercise the proper caution and care in seeing that his coach is not only sound and complete of its kind, but is also of a safe kind. The traveling public have a right to expect that he who undertakes to fill such a responsible post will bring to the discharge of its duties all the knowledge that appertains to the calling; that he will observe and compare the different kinds of coaches in use, and direct his attention to the principles on which they are constructed, in order to use a well informed experience and an enlightened judgment in the selection of such as will be most likely to insure the safety of those who are to be carried in them. The carrier cannot be said to have fulfilled the requirements of the law so long as there exists any known want of safety in his coaches, harness, &c., whether arising from defectiveness of material or workmanship, or faultiness of the principle on which they are constructed, for which there is a known remedy, used wisely, as a means of safety, by others, of skill and sound judgment, engaged in the same

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business. A danger arising from any such defect cannot be properly regarded as one of those risks or dangers, necessarily incident to the mode of travel, which it is presumed every passenger has made up his mind to encounter.

In the case before us there was not only testimony tending to show that there would be a greater degree of safety in using harness with breeching than without, but that the horses could be readily trained to the use of such harness in holding back. In this state of things, seeing that the slight change in the harness, by the addition of breeching, would be attended by little or no expense, and with slight trouble or inconvenience in training the horses to the use of it, it seems to me that it was a fair subject for the jury to consider (in case they believed what the evidence of the defendant in error tended to prove) whether the failure of the plaintiff in error to make the change, as a measure of safety, was not evidence of a want of proper care and vigilance on his part, in providing for the safety of those traveling in his coaches.

The seeming conflict in the instructions was brought about by the plaintiff in error, in asking and obtaining from the court an instruction to which, in the view I have taken, he was not entitled; and there is nothing, therefore, in that particular, of which he has any right to complain.

Upon a view of all the instructions given by the court, as a whole, I have been unable to discover that they assert any principle which bears too harshly on the plaintiff in error, or which was calculated to mislead the jury, to his prejudice. And at a period when the facilities for travel are so rapidly multiplying, and the amount of travel is so constantly on the increase, I feel no disposition to relax any of the rules which hold a carrier to a strict accountability. When so many causes are conspiring to engender and foster a

love for the excitement of rapid traveling, which is daily betraying the managers and conductors of every species of conveyance into a fatal disregard of all the precautions essential to the preservation of the limbs and lives of those committed to their charge, I do not think that the law should slacken the reins by which, to some extent at least, it holds them in check. On the contrary, policy, humanity and reason all seem to require from the courts a stern adherence to the principles which tend to insure the greatest care on the part of the carrier, and the least danger to the passenger.

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The fourth instruction given at the instance of the defendant in error is objected to, not because it states the law incorrectly, but because, as is said, there was no evidence tending to prove that the coach was upset in consequence of having too much baggage on the top. If there was no evidence on that head, the plaintiff in error could not have been injured by a correct statement of the law, that the carrier would be liable for an injury arising from an overturning of the coach occasioned by its being too heavily loaded on the top. On the other hand, if there was any competent and relevant testimony, however slight, tending to show that the upsetting was due to that cause, the defendant in error was entitled to have the law in that particular hypothetically expounded to the jury. There was, I think, evidence tending to the proof of such fact. Discarding the statement of the witness Cralle, that the driver (Carper) said to him that he thought there was too much baggage on the top, and that he thought the upsetting was in part occasioned thereby, as illegal, except for the purpose of impeaching Carper, I think there was circumstantial evidence, though slight, tending to the conclusion that the coach was top-heavy, and that the upsetting may have been partly due to that cause. It is in proof that

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there were eleven passengers, nine inside and two on the outside. How and where their baggage was disposed does not appear, with the exception that one of the passengers proved that his trunk was in the boot behind.

Carper says that he has no recollection as to the amount of baggage on the top of the stage, or the number or size of the trunks; that "he found it all on and under the canvas when he took charge, and had no occasion to handle or examine it." And he further states "that in coming down the hill and around the turns, the stage rocked very much from side to side, and just before turning over on the left hand, had strongly tilted to the right, and, in falling back, tilted the other way, and seemed to him to be for some distance on the left wheels before it went clear over."

And it is further shown that at the point where the coach overturned the road was level across, though slightly descending. The rocking of the coach from side to side, and the manner of its turning over, were circumstances tending to the inference that it was top-heavy. I think the defendant in error had a right to the instructions.

The last cause of error assigned is the refusal of the court to set aside the verdict and grant a new trial. We have no certificate of the *facts*, but only a certificate of the *evidence*. When such is the case, this court has uniformly refused to take cognizance of the exception, except when it appears that, after rejecting all the parol evidence in favor of the party excepting, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong. *Pasley v. English*, 5 Gratt. 141; *Rohr v. Davis*, 9 Leigh 30. Applying this rule, there is nothing to rebut or weaken the *prima facie* case made by proof of the upsetting of the stage, and the conse-

quent injury to the defendant in error. So far from it, the evidence in favor of the verdict shows most clearly a case of culpable negligence on the part of the driver. Without adverting to the other evidence in support of such a conclusion, the driver's own account of his conduct proves it. He showed a want of ordinary care in failing to make a more minute examination of the blocks at Red Banks, where he first took charge of the coach. There was the same want of care in their examination at Woodstock, when the most ample time and opportunity were afforded for a thorough examination. Having failed to make such examination at Woodstock, he was guilty of the grossest negligence in failing to assure himself that the blocks were in before he commenced descending the hill where the disaster occurred. In the absence of breeching or any other substitute by which the horses could hold back and prevent the stage from running on them, he knew that his main, if not sole, reliance for a safe descent of the hill was in the brake, which, he also knew, would be of no avail if the blocks were not in place; yet he most negligently and recklessly commenced the descent of the hill without having tested the presence or absence of the blocks, which might have been done by simply applying his foot to the brake. Whilst descending the hill he for the first time discovered that the blocks were out. The brake of course was useless. As might have been expected, the stage soon began to run on the horses, and they, in the absence of any other cause of fright, ran off and upset the stage. The disaster is thus most clearly traced, by the driver's own account of his conduct, to his unpardonable failure to provide the means, within his power, by which to prevent it.

It is, however, in the last place, insisted that the damages are excessive, and that this appears from the

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evidence of the defendant in error, and that the court ought to have granted a new trial for that cause.

There is no rule of law fixing the measure of damages in such a case; and it cannot be reached by any process of computation. In cases of the kind the judgment of the jury must govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. 16 Pick. R. 547.

On the one hand, the damages seem to be heavy. On the other, the injuries, losses and sufferings, which they are designed to compensate, are proved to be great.

The head of the defendant in error was severely cut, and one of his legs badly broken, the smaller bone protruding through his clothing and boot. One of his physicians thought, at first, that amputation would have to be resorted to. His agonies, physical and mental, must have been intense. For some time his mind was seriously affected. At the time of the trial, rather more than a year after the happening of the disaster, his leg had not entirely healed; the limb was shortened and the joint stiff. The use of crutches was still necessary, and the physicians expressed the opinion that he would be a cripple for life. He was necessarily confined for some six months in a house near the place of the disaster, detained from his business, and from his home, which was in another state. The presence of members of his family, some during the whole time, and others for a portion of it, was necessary, in order that his wants and comforts might be properly attended to; and the expenses which he encountered in the discharge of the bills for boarding and the attendance of his physicians, and other incidental charges, were necessarily large.

In view of such a state of facts, I cannot undertake to say that the damages are so plainly beyond a reasonable compensation, so manifestly exorbitant, as to require us to disturb the estimate and verdict of the jury.

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I think the judgment ought to be affirmed.

The other judges concurred in the opinion of *Daniel, J.*

JUDGMENT AFFIRMED.

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(Absent, Allen, P.)

November 6th.

1. Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by the executor.
2. Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond.
3. If the executor has assented to a specific legacy, and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery: But the intention to waive the refunding bond must be very clear.
4. In a suit by a residuary legatee against the representative of two estates, in which it is contended that property specifically bequeathed by one testator is the property of the other estate; *quære*, if the specific legatee is not a necessary party; and therefore whether, not having been a party, the record of that suit is evidence against him.
5. A cause is brought on to be heard upon the bill, answer, exhibits, and award; *quære*, if the depositions and commissioner's report are a part of the record, and evidence as such in a case in which the record is evidence.
6. An executor, though he has authority to submit a matter to arbitration, yet is responsible as for a *devastavit* if by the award his testator's estate is injured.
7. An executor making an improvident submission to award, as to a part of his testator's estate which has been specifically bequeathed, and the result of the submission being that the property is left in his hands as his own property, and he is compelled to pay for it, the legatee is not precluded by the award from recovering the specific property.
8. The statute of limitations cannot bar the legatee's claim to his specific legacy whilst it is held as such by the executor, though he had long before assented to the legacy.
9. A delay of seventeen years by a specific legatee to sue for his legacy, held, under the circumstances, not to bar his claim.

Jesse Cornwell, of the county of Prince William, died in 1805, leaving a will, which does not seem to

have been recorded until August 1813. By his will he gave to his wife, Constance Cornwell, the whole of his estate whilst she remained his widow; but if she should marry again, or upon her death without marrying, his whole estate, after the payment of his debts, was to be divided equally amongst his children. And he appointed her and his son Gustavus his executors.

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At Cornwell's death he left five children, his son Gustavus, who died in the life time of his mother, intestate and unmarried, and four daughters, Nancy, who married Nehemiah Brockley; Lydia, who married Cornelius Hoff; Catharine, who married first Petty and afterwards John Appleby, and Kitty Cornwell.

Constance Cornwell took possession of the estate and paid the debts, and seems to have divided some of the slaves among the four daughters during her life. In April 1810 Cornelius Hoff executed a paper, by which he acknowledged the receipt of a slave named Martin and a horse, which, with what he had before received, was in full of the interest of his wife in the estate of Jesse Cornwell; and Gustavus Cornwell purchased the interest of Brockley in the estate.

Some six or seven years after the death of Jesse Cornwell, Constance Cornwell purchased of her father a negro girl named Prucy, then about ten or twelve years old, for two hundred dollars; and some three or four years after this purchase she sold a negro man named Juba, belonging to her husband's estate.

In 1825 Constance Cornwell died, having made a will, which was admitted to record in the County court of Prince William; and Thomas Nelson qualified as her executor; and at the same time qualified as administrator *de bonis non* with the will annexed of Jesse Cornwell deceased. By her will Constance Cornwell bequeathed to her grand son, John Cornwell, the oldest son of her daughter, Kitty Cornwell, the following slaves, viz: Letty, Prucy, and her two chil-

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dren, Elizabeth and Albert, and the increase of the females forever, and also a horse: And she directed that he should not sell any of the slaves, or their future increase; and if he attempted to sell them, they were to be free. And she directed that the proceeds of the sale of her stock, after paying her debts, should be retained by her executor, and applied to the use of the slaves until John Cornwell came to the age of twenty-one years; at which time the slaves were to be delivered to him by the executor. The remainder of her estate she directed to be sold and divided among her four daughters.

The personal estate of Constance Cornwell, including the slaves and horse given to John Cornwell, was appraised at five hundred and seventy-nine dollars and forty-eight cents. Prucy and her children, of whom there were then three, were appraised at four hundred and fifty dollars, and Letty was appraised at ten dollars. There was also a small tract of land, which was sold by the executor in 1833, to Catharine Petty, for one hundred dollars. The estate of Jesse Cornwell, which came to the hands of the administrator, was a slave named Frank, appraised at three hundred and twenty-five dollars, and Betsy and her two children, who were in the possession of Catharine Petty, and were claimed by both herself and Kitty Cornwell; and there was then a suit pending by the latter against the former for the recovery of them, which suit went off in 1834.

In June 1828 Kitty Cornwell, Brockley and wife, Catharine Petty and Cornelius Hoff entered into a covenant with each other to submit their rights in the estates of Jesse and Constance Cornwell to arbitration; and on the 5th of December 1829 the arbitrators made their award. They decided that Constance Cornwell had no right to dispose of the property disposed of by her will, and that it should

be considered as the property of Jesse Cornwell's estate; that Hoff and Bröckley were not entitled to any further portion of Jesse Cornwell's estate. And treating the property mentioned in the inventory and appraisement of both estates as belonging to that of Jesse Cornwell, and deducting from the amount of the whole the probable worth of Betsy at the age of fourteen years, two hundred dollars, and the further sum of two hundred dollars, to which the children of Betsy were appraised, and the further sum of six hundred dollars, to which Gustavus Cornwell was entitled, so as to equalize the advancements to Mrs. Petty and Kitty Cornwell, they divided the balance into four parts, of which they gave to each of these one part, and directed that the other two parts should be divided among the four surviving children of Jesse Cornwell, as heirs of Gustavus Cornwell.

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In 1835 Kitty Cornwell instituted a suit in equity in the Circuit court of Fairfax against Nelson, Hoff and wife, Brockley and wife, Catharine Petty and others, for the purpose of enforcing the award of the 5th of December 1829, and also of enjoining a judgment recovered against her by William J. Weir, as assignee of Nelson, on a bond given by her to Nelson for one year's hire of the slave Frank, belonging to the estate of Jesse Cornwell. In her bill, after stating the foregoing facts, and that under the award she was entitled to Betsy and her children, then four in number, she charged that Nelson had become possessed of these slaves, then as she believed worth two thousand dollars, and that she was entitled to a share of the other estate in his hands; that she had not been able to obtain from Nelson any part of the property; that pending these questions as to the right of property in Jesse Cornwell's estate, Nelson had hired to her one of the slaves belonging to the estate, for the sum of forty dollars, for which she had

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given her bond, bearing interest from the 1st of January 1831, which he had passed away, so that it had come into the hands of William J. Weir, who had obtained a judgment upon it; that there were no debts of Jesse Cornwell to be paid, and she was about to be compelled to pay the amount of this bond given for the benefit of the estate to which she was herself entitled.

She further charged that Nelson had taken possession of the slaves, Betsy and her children, and had them appraised as a part of the estate of Jesse Cornwell; and that by some fraudulent combination between Nelson, Catharine Petty and John Appleby, who claimed one of the children, to deprive the plaintiff of her just rights, the said slaves had been sold and carried off to the south.

The prayer of the bill was for a settlement of Nelson's accounts as administrator of Jesse Cornwell's estate, and that he might be compelled to pay her the amount due to her from said estate; and that Williams, one of the parties made defendants, might be enjoined from paying away the purchase money of said slaves until the further order of the court; and for general relief. An injunction was awarded according to the prayer of the bill; but was afterwards dissolved as to the judgment obtained by Weir.

Catharine Petty answered, denying the validity of the award, on various grounds, one of which was, that Constance Cornwell by her will left property to a considerable amount, which it was contended she had acquired after the death of her husband, to a certain John Cornwell, and that this property was decided by said arbitrators to be divisible among the parties to the award, when John Cornwell was no party thereto and not bound by their decision.

That as to Betsy and some of her increase, she had held adverse possession of these slaves more than five

years before the institution of this suit, and thus, independent of any other pretension, had acquired a perfect title to them. That the property of Jesse Cornwell not having been distributed at the death of Constance Cornwell, the complainant had hired the negro man Frank from Nelson, and had not paid any of her bonds for the hire since 1827; and had finally, as respondent was informed and believed, sold the said slave to a trader; that the said slave would have sold for eight hundred dollars; and thus the complainant had received a proportion of the estates of Jesse and Constance Cornwell greater than she would have been entitled to upon an equal division of the estates. She admits she sold the slaves, Betsy and her children, for one thousand five hundred dollars.

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Nelson also answered the bill. After referring to the death of Jesse and Constance Cornwell, he stated that Constance Cornwell by her will, amongst other things, bequeathed to her grand son, John Cornwell, a slave called Prucy and her children, and the increase of the females of them; also a horse; with a proviso, that he should not be at liberty to sell the said slaves, and that if he attempted to do so, they should be free. And he stated the other provisions of the will. He alleged that the slaves Prucy and her children were the absolute property of Constance Cornwell in her own right; and were not held or claimed by her under the will of her husband.

He further states that the complainant had hired the slave Frank from him, from 1827 to 1835, and had never paid the hire; and that she had fraudulently sold him, and he had been sent out of the state. That Catharine Petty had gotten possession of Betsy and of one child she then had, and afterwards sold her and her four children to some person unknown to him, by whom they were removed from the state: And he

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denies that he was in any manner accessory to said sale.

He further states that he had settled his accounts of administration upon both the estates of Jesse and Constance Cornwell; and that he settled with Hoff and Nancy Brockley for their shares in both estates, and had their receipts. That charging the complainant with the hires of Frank and his value, she will be found largely a debtor to the estates; and that he is ready to settle with Catharine Petty.

He said that he had no personal knowledge of the award mentioned in the bill, but insisted it could not extend his liabilities; and having been founded on a gross error of fact, it was not obligatory even on the parties to the submission. That as to the land held by Constance Cornwell in her own right, and as to the slave Pruey and her children, and the horse devised to her grand son, John Cornwell, who was yet alive, her will was in all respects valid. And the arbitrators had by their award, under a mistake as to this fact, taken away the property devised to John Cornwell, who was no party to the submission, and had adjudged it to others. And he insists that for this and other reasons the award is void.

In May 1837 the court made a decree, directing Nelson to settle his accounts of administration on the estates of Jesse and Constance Cornwell before a commissioner of the court; and it was further ordered that said commissioner take any and all such evidence as either party may require, and report the same to the court. At the May term 1838 the report of the commissioner was recommitted, and he was directed to enquire what portions of the slaves or other property, in the proceedings mentioned, belonged to the estates of Jesse and Constance Cornwell, respectively; what amounts in money or property had been received

by the respective legatees; that he settle accounts between said legatees, and that he equalize their shares of the same, as near as may be, according to their respective rights and interests.

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At the May term 1842 an order was made, by consent of parties, that the matters in dispute between the parties be referred to Algernon S. Tebbs and Ferdinand D. Richardson, with umpire, whose award, or the award of such umpire, should be final. And on the 8th day of June 1844 the cause came on to be finally heard upon the bill, answers, exhibits and the award of A. S. Tebbs and F. D. Richardson, which was filed at the preceding term of the court; and no exceptions having been taken thereto, it was decreed that the said award be confirmed, and that the complainant, Kitty Cornwell, recover of the defendant, Thomas Nelson, the sum of four hundred and seventy-four dollars and sixty-four cents, with legal interest on three hundred and fifty-eight dollars and twenty-two cents, a part thereof, from the 1st of October 1843 till paid, and the costs of this suit; and that the said Thomas Nelson recover of Catharine Appleby, formerly Catharine Cornwell, the sum of three hundred dollars, with interest from the 14th of October 1843, without costs.

There is a memorandum of the clerk, made in the foregoing cause, that the award referred to in the foregoing decree is not now among the papers in the cause, the same having been lost or taken from the bundle.

The report of the commissioner in this cause does not appear; but there are a number of depositions, exhibits, &c., which the clerk states is a part of the record in the cause, and were referred to and returned with the commissioner's report. These depositions generally related to the slaves Frank and Betsy and her children; but there were some of them which re-

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lated to Prucy and her children. Although there was some contradiction in the testimony, yet it was clear that Frank had been carried off and sold in 1835, and that Kitty Cornwell had received the purchase money. How much that was the evidence did not disclose; and the estimate of his value varied from three hundred and fifty dollars to eleven hundred dollars. Prucy and her six children were valued at that time by two witnesses at one thousand seven hundred and twenty dollars. A witness, who was called on by the commissioner, speaks of them as being of very light complexion; some of the children would be taken to be white, and they were generally delicate. They were valued at small prices, on account of their complexion and health.

In a memorandum of notes of the evidence and points in the cause, returned by the commissioner with his report, it is stated that Nelson was indebted as administrator and executor, on the 1st of May 1838, four hundred and eleven dollars and twenty-four cents of principal, and two hundred and four dollars and sixty-six cents, interest to that date. Up to that time he had advanced to Catharine Petty two hundred and ninety-eight dollars and thirteen cents of principal, and seventy-four dollars and five cents of interest, and to Kitty Cornwell three hundred and nineteen dollars and seventy-seven cents of principal, and one hundred and twenty-two dollars and ninety-six cents of interest. He estimates the value of Frank, when sold in 1835, at one thousand dollars; and Betsy and her children, at same time, at one thousand five hundred dollars. Of Prucy and her children, he says, they cannot be brought into this controversy, John Cornwell not being a party; and Kitty Cornwell makes no claim to them in her bill or otherwise, except that she has taken some evidence leaning that way. These slaves are in the possession of Thomas Nelson, the defendant.

Thomas Nelson died in 1845, and John C. Weedon qualified as his administrator. Prucy and her children having been in the possession of Nelson at his death, Weedon took possession of them as a part of his estate. He sold two of the children to a trader, who took them to Washington city; and in June 1847 John Cornwell, then living in Georgetown, instituted proceedings to recover them, as belonging to him under the will of Constance Cornwell.

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In July 1847 John Cornwell instituted this suit in the Circuit court of Prince William, against Weedon, to recover Prucy and her other children. In his bill he set out the bequest to him by Constance Cornwell, of the slave Prucy and her children, to be delivered to him when he attained to the age of twenty-one years; the taking possession of the slaves by Nelson as her executor; the death of Nelson without having delivered the slaves to him; that the estate of his testatrix was not indebted, or the debts were all paid; that Weedon had sold two of the slaves, and the plaintiff apprehended he would sell the others, and have them sent off to the south. And stating their names, he said that he could not prove that Nelson had ever assented to the legacy, or that all or which of the slaves were in the possession of Weedon. He calls upon Weedon to say in whose possession the slaves are; and he prays for an account of their value and profits since the death of Constance Cornwell, for a delivery of them to the plaintiff, and for general relief.

Weedon demurred to the bill for want of equity, and because a personal representative of Constance Cornwell should have been made a party. He also pleaded the statute of limitations; and answered. In his answer he says that he has been informed that Prucy and her children were not the property of Constance Cornwell, though she may have attempted to dispose of them by her will; and he calls for strict

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proof of the fact that they were hers. He says further that Nelson made an effort to assert his testatrix's title to said slaves, but without success, and that they were held to be the property of Jesse Cornwell's estate, and that Nelson had been compelled to account for them as such. That Prucy and her children belonged to Nelson in his life time, having been, as he was informed, accounted for by him to the legatees of Jesse Cornwell's estate, as part of that estate; and after Nelson's death they came into defendant's possession; and two of them had been sold by him to pay Nelson's debts. That the slaves had been kept openly by him as a part of Nelson's estate, and he had never heard of any claim set up to them by the plaintiff until the month of January 1847. He insisted further that the plaintiff was a free negro or mulatto, and therefore had no right, since the act of March 15th, 1832, to maintain any action or suit in equity for the purpose of recovering or otherwise acquiring a permanent ownership of any slave in any of the courts of the state of Virginia. And further, that the plaintiff, having slept upon his rights for more than twenty years, was not entitled to the aid of a court of equity, after the death of Nelson and the loss of proof by death of witnesses and otherwise, for the purpose of asserting any demand under Constance Cornwell's will.

A number of witnesses were introduced by the plaintiff, who testified as to the purchase of Prucy, then a girl of ten or twelve years of age, by Constance Cornwell; and that she and her children were always claimed by her and considered as her own property. Some of them also testified to the admissions of Nelson, up to a short period before his death, that the slaves were the property of John Cornwell, and that he held them for him. The credibility of some of these witnesses was assailed by the defendant; and

witnesses were introduced by both parties, whose opinions as to their character for veracity differed.

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It appeared that the plaintiff was the son of Kitty Cornwell, and was a mulatto. He attained the age of twenty-one years in 1830; and in 1828, when a minor, he received from Nelson the value of the horse left him by Constance Cornwell, and left the state; and, so far as the record shows, was not heard of again until 1839, when he was living in Georgetown, in the District of Columbia, where he has continued to live ever since. It appeared, too, that Prucy herself was a light mulatto, and her children were very light mulattoes, some of them showing scarce a trace of negro blood; and it seemed that the children were the children of Nelson. The other facts appearing in the cause have been already stated, except the evidence of A. S. Tebbs, one of the arbitrators upon whose award the decree of the 8th of June 1844, in the case of Kitty Cornwell against Nelson and others, was founded. His testimony is stated by Judge *Moncure* in his opinion.

In the progress of the cause the personal representative of Constance Cornwell was made a defendant, and the case was removed to the Circuit court of Spotsylvania.

The cause came on to be heard on the 24th of May 1852, when the court overruled the demurrer and plea, and made a decree in favor of the plaintiff for the slaves in controversy, and for an account of profits. And from this decree Weedon applied to this court for an appeal, which was allowed.

Patton, for the appellant.

Heath and *Neale*, for the appellee.

MONCURE, *J.* delivered the opinion of the court:

The questions which arise in this case are: First.

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Whether a court of chancery has jurisdiction of it? Secondly. Whether the slaves in controversy belonged to the estate of Jesse Cornwell, instead of to Constance Cornwell, at the time of her death? Thirdly. Whether the claim of the appellee, John Cornwell, to the said slaves is concluded by the award of 1829, and the award, decree and other proceedings in the suit of Kitty Cornwell against Thomas Nelson, administrator of Jesse and executor of Constance Cornwell and others? And fourthly. Whether it is concluded by the act of limitations, or by acquiescence or laches on the part of the appellee? Another question was raised in the court below, viz: Whether the appellee, being a free mulatto, was capable of acquiring permanent ownership of the slaves. But no notice having been taken of that question in the petition for the appeal, or the argument in this court, it may be considered as having been abandoned: and was properly so; the act of 15th March 1832, Sup. Rev. Code, p. 246, having been passed since the death of the testator, and the law of the state prior to the passage of that act not having prohibited the acquisition or ownership of slaves by free persons of color.

Proceeding to consider the other questions in the order above stated, let us enquire:

First. Whether a court of chancery has jurisdiction of the case?

Formerly, in England, suits for legacies were generally brought in the ecclesiastical courts. But they are now rarely brought in those courts, on account of their not possessing adequate jurisdiction to afford complete relief in most cases. 2 Roper on Legacies 1792. From the time of Lord Chancellor Nottingham, if not from an earlier period, courts of equity have exercised concurrent jurisdiction of such suits with the ecclesiastical courts. They now exercise jurisdiction in many cases in exclusion of those courts:

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as, for instance, where the legacy is to a married woman, or an infant, or involves a trust, or where a discovery of assets is required. In this state, suits for legacies are brought in courts of equity only; except in the few cases in which a court of common law has jurisdiction. No suit will lie at common law to recover a legacy, unless the executor has assented thereto. If no such assent has been given, the remedy is exclusively in the courts of equity. 1 Story's Equ. Jur., § 591. Since the decision of *Deeks v. Strutt*, 5 T. R. 690, it has been considered as the settled doctrine in England, that no action at law will lie to recover a general legacy; even though there be assets, and the executor expressly promised to pay it. 2 Roper on Legacies 1798; 1 Story's Equ. Jur., § 591, 592. This doctrine, however, has not been recognized in any case decided by this court; and Tucker, P., in *Kayser, ex'or, v. Disher*, 9 Leigh 357, seemed to be unwilling to admit it in its whole extent. It is well settled in England, that an action at law is maintainable against an executor for a specific legacy, after assent given: and that would no doubt be regarded as sound doctrine in this state, at least where the executor waives his right to require a refunding bond. But it is laid down in 1 Story's Equ. Jur., § 593, as very certain, that courts of equity now exercise jurisdiction in cases of legacies, whether the executor has assented thereto or not. "The grounds of this jurisdiction (he says) are various. In the first place, the executor is treated as a trustee for the benefit of the legatees; and therefore, as a matter of trust, legacies are within the cognizance of courts of equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction. In the next place, the jurisdiction is maintainable in all cases where an account or discovery or distribution of the assets is sought, upon general principles." And "in the next place, there is in

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many cases the want of any adequate or complete remedy in any other court." I have seen no case in which it was decided that a court of equity has not jurisdiction in a suit for a legacy, brought by the legatee against the executor. The assent of the executor to the legacy may give a right of action at law, but will not take away the right of suit in equity. Until the legacy is paid or delivered by the executor to the legatee, the former's trust is executory, and may be enforced in a court of equity. The executor may retract his assent, if given upon a reasonable ground for considering the assets as sufficient for all demands, but which prove deficient in consequence of unknown debts unexpectedly claimed. 2 Lomax on Ex'ors 132. The legatee cannot be expected to know the state of the assets, and the executor cannot complain that the suit against him is brought in a court in which an account can be taken of the assets; and if found deficient, the legacy may be applied to make up the deficiency. These observations apply with increased force in this state, in which an executor, before he can be compelled to pay or deliver a legacy, has a right to require a refunding bond for his indemnity; unless the legatee pursue the course prescribed by the Code, p. 554, § 32.

An executor may certainly agree to dispense with a refunding bond, and to pay or deliver the legacy to the legatee, or hold it for his benefit; and in the latter case, the legacy would in effect be paid or delivered to the legatee: the executor holding the subject as his agent, and the possession of the agent being that of the principal. In such a case the remedy of the principal against his agent would probably be at law, and not in equity. But to create such a case the evidence of intention to waive the right to require a refunding bond should be very clear. An executor may be willing to assent to a legacy, and even to hold

it for the benefit of the legatee, and still not willing to part with the possession of it without a refunding bond. Assent is generally given, and may be enforced by a court of equity, when all debts known to be in existence are paid. But there may be other debts; and against them the refunding bond is intended to guard. An intention to waive the right to require such bond will not be inferred from a mere assent to the legacy. The assent, in the absence of clear evidence to the contrary, will be presumed to be on condition that the bond be given.

Applying these principles to this case, it is unnecessary to enquire whether the executor, Nelson, ever assented to the legacy of the slaves in controversy; as there can be no doubt that he never parted with the possession of them as executor, nor waived his right to require a refunding bond. Upon this ground, therefore, I am of opinion that a court of chancery has jurisdiction of the case. Whether it has jurisdiction upon any of the other grounds relied on in the bill, is a question which need not be considered.

Secondly. Did the said slaves belong to the estate of Jesse Cornwell, instead of to Constance Cornwell, at the time of her death?

The appellant contends that she sold Juba, who belonged to the estate of her husband, Jesse Cornwell, and bought Prudence (or Prucy) with the proceeds, intending to substitute the latter in place of the former; and that whether she so intended or not, the legatees in remainder of Jesse Cornwell had a right to claim Prudence and her issue as having been acquired by means of a trust fund to which they were entitled; or, at all events, that these slaves were liable for the debt due by the testatrix for the proceeds of the sale of Juba.

If the case be considered without reference to the record of the suit before mentioned, and the deposi-

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tions copied therein, there can be no doubt as to the title of the testatrix to the slaves at the time of her death, nor as to the right of the appellee to claim them as legatee under her will, free from any claim of the legatees in remainder of her husband. The evidence shows that she bought Prudence when a little girl, shortly after her husband's death in 1805, about four years before the sale of Juba, at the price of two hundred dollars, which she paid out of her own money; that she always claimed, and was reputed, to be the absolute owner of Prudence and her children, until her death in 1825, when she bequeathed them to her grand son, the appellee; that they were inventoried and appraised as part of her estate shortly after her death; and that they were always held and claimed by her executor, Nelson, as part of her estate, until his own death in 1845. Besides the record and depositions aforesaid, there is nothing in the case to oppose this strong evidence of title, except some evidence introduced by the appellant to impeach the credit of some of the witnesses of the appellee. Conceding the impeachment to be successful, as far as it goes, the testimony remaining unimpeached is amply sufficient to sustain the title of the testatrix and the claim of the appellee.

In regard to the additional evidence afforded by the record and depositions in the suit aforesaid: I think it is at least questionable whether the appellee ought not to have been a party to that suit; and not having been so, whether the record and proceedings therein are admissible evidence against him. I also incline to think that even if the record be admissible, the depositions copied therein are not properly a part thereof. They all appear to have been taken by the commissioner and returned with his report, which was recommended; and before another report was made, there was an order of reference in the suit, an award, and

a final decree thereon. The decree recites that the cause came on to be heard on the bills, answers, exhibits and award; saying nothing of the commissioner's report and depositions; which seem, therefore, to be no part of the record, according to the case of *Shumate v. Dunbar*, 6 Munf. 430. But without expressing any definitive opinion upon these questions, and considering the said record and depositions as admissible evidence, I am still of opinion that it does not alter the case; and that upon all the evidence therein the testatrix was clearly entitled to the slaves at the time of her death.

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It is contended, however, that if she was entitled to the slaves, they were at least liable for the proceeds of the sale of Juba, as a debt due by her at the time of her death. If any such debt ever existed, it has, I think, been fully satisfied. Though entitled to a life estate in all the property of her husband, and though she survived him twenty years, she appears long before her death to have made large advances of slaves and other property to most of her children. As early as 1810, fifteen years before her death, she had made advances to one of them, Lydia Hoff, in full of her interest in the estate. She was one of the four distributees of her deceased son, Gustavus, who, besides his own share of the estate, claimed to have purchased the share of his sister, Nancy Brockley; on account of which two shares nothing had been advanced. She left some other estate, besides the slaves in controversy and her interest as distributee aforesaid, which came to the hands of her executor, Nelson, and on account of which a balance of two hundred and thirty-eight dollars and seventy-three cents was found to be due by him on the settlement of his administration in 1836. The legatees in remainder have received the benefit of that balance, and of her interest as distributee of her deceased son; which, saying nothing of the

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benefits received in the way of advancements, must have much more than satisfied and compensated any claim they could have against her on account of the price of Juba. But in fact no suit was ever brought to recover any such claim; and if one were now brought, the act of limitations or lapse of time would be a sufficient defence against it.

Thirdly. Is the claim of the appellee concluded by the award of 1829, and the award, decree and other proceedings in the suit aforesaid?

I do not understand it to be now contended that the award of 1829 is conclusive; or that it can have any effect upon the case. Neither the appellee, nor Nelson, the administrator of Jesse and executor of Constance Cornwell, was a party to the submission. The award was void, even for matter appearing upon its face; was not acted upon or executed by any of the parties; was expressly repudiated by some of them; and was claimed to be enforced by none of them, except Kitty Cornwell, who attempted to set it up in her suit brought in 1835. It may therefore be dismissed from further consideration.

Then, as to the effect of the award, decree and other proceedings in the suit aforesaid: In the argument of this case the question was raised and discussed, Whether the slaves in controversy were disposed of, or intended to be disposed of, by that award and decree? The counsel for the appellant maintained the affirmative, and the counsel for the appellee the negative, of this question. The award itself has been lost; and the decree is merely for certain sums of money in pursuance of the award. The contents of the award can only be conjectured, or inferred from the pleadings and proofs in the suit. The slaves are not expressly named in the bill; the main object of which was to recover the slaves, Betsy and her children, claimed to have been advanced to the complain-

ant by her mother, and adjudged to be hers in the award of 1829; but which had been sold by her sister, Mrs. Petty, for one thousand five hundred dollars. Another object of the bill was to enjoin a judgment which had been recovered against her on one of her bonds for the hire of the slave Frank, belonging to her father's estate; which slave she secretly sold about the time she filed her bill, and was of the value of eight or ten hundred dollars. But for these objects the suit would probably not have been brought. For the purpose of attaining them, and especially the one first named, she attempted to set up the award of 1829, and to have the estates of Jesse and Constance Cornwell disposed of according thereto. Notwithstanding the invalidity of that award, it was competent for the court, under the prayer for general relief, (if all proper parties were before it,) to decree an account and distribution of the estates of Jesse and Constance Cornwell; and, for that purpose, to determine to which of the said estates the slaves in controversy belonged. Whether the court did in fact so determine, is the question. The appellee, John Cornwell, was of all persons the most interested in such a determination; and was certainly a proper, if not a necessary, party to the suit, if it involved his title to the slaves in controversy. The fact that he was no party to the submission is relied on by the executor, Nelson, as one of the grounds of the invalidity of the award of 1829. Commissioner Macrae, in his report in the suit, says: "Prucy and her increase cannot, it is conceived, be brought into controversy, and adjudicated in this cause, whilst John Cornwell, to whom they were bequeathed by the will of C. Cornwell deceased, is not a party to this suit; whose claim cannot be affected by the litigation of the parties, of whom he is not one; and the plaintiff, Kitty Cornwell, makes no claim to Prucy and children in her bill, or other-

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wise, except that she has taken some evidence leaning that way." That after this the appellee was not made a party to the suit, is an important fact to be considered in deciding the question whether the slaves were disposed of by the award and decree; especially since, if they were so disposed of, they were thereby made the property of the executor Nelson himself. The executor is a sufficient representative of the legatees only when his interest is not adverse to theirs. The small amount of the decree is also relied on by the counsel of the appellee as strongly tending to show that the slaves in controversy could not have been charged to the appellant in the award. There are but two sums decreed in the suit: One, to wit, four hundred and seventy-four dollars and sixty-four cents, with interest on three hundred and fifty-eight dollars and twenty-two cents from the first October 1843, in favor of Kitty Cornwell against Nelson; and the other, to wit, three hundred dollars, with interest from the same day, in favor of Nelson against Caty Cornwell or Petty.

The lowest estimate which was put upon the value of these slaves in 1838, when the commissioner's report was made, was one thousand seven hundred and twenty dollars. They seem to have increased rapidly in value after that time until 1850, when they were valued at about five thousand dollars. What was their value in 1843, when the award was made, or in 1844, when the decree was made, does not appear, though it probably much exceeded the value in 1838. Setting down the value only at one thousand seven hundred and twenty dollars, and deducting from it six hundred dollars, which is the highest estimate made of the expense of keeping the slaves, over and above their hires, while they were in the hands of Nelson prior to 1838, a balance would remain of one thousand one hundred dollars, which is the lowest sum with

which it is contended he was charged for the slaves. It is difficult to understand how he could have been charged even with this small sum, consistently with the small amount of the decree against him. It is not pretended that he paid anything on account of these slaves to Lydia Hoff or Nancy Brockley, as to whom the bill was dismissed. He says in his answer that in 1830 and 1833 he settled with these parties for their shares of both estates, and held their acquittances; and the fact is confirmed by the commissioner's report and the failure of these parties to assert any claim. In the same answer, filed in 1837, he affirms the continuing title of the appellee to the slaves in controversy, which is inconsistent with the idea that he had previously accounted with Lydia Hoff or Nancy Brockley, or any of the other legatees in remainder, for any part of the value of the slaves in controversy. Therefore, he could have accounted only with Kitty Cornwell, and perhaps Caty Petty, if with any of the said legatees, and with them only by means of the award and decree aforesaid. And yet the amount decreed against him is little, if any, more than he seems from the materials in the record to have owed, independently of any charge on account of the slaves. On the other hand, one of the arbitrators, Mr. Tebbs, whose deposition was taken five years after the award was made, testifies that the purpose of the award was to settle the claims in dispute between the heirs of Jesse and Constance Cornwell and Nelson, the administrator. "The arbitrators took into their estimate and settlement all the negroes of said decedents' estates. About these there was much difficulty. Some had been sold: Perhaps all of them. Some were claimed by one party, and the same by another. There had been one or two valuations of the negroes. I recollect negro Pru and her children had been valued, and there was much evidence taken as to the

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value of them. So it was, the arbitrators took the whole of the negroes into their calculations and estimates with the other property of the estate, and made their award accordingly; aiming at a final settlement of affairs between the personal representative and the distributees of said decedent." He does not say what disposition the award made of Prucy and her children; whether it left them in the hands of Nelson, as executor of Constance Cornwell, or agent of the appellee; or whether it converted them into the individual property of Nelson, and charged him in some way and to some extent with their value. Either of such dispositions would be consistent with his testimony; though the latter would have been very irregular, if not illegal, and difficult to be reconciled with the amount of the decree. The deposition of the other arbitrator, F. D. Richardson, was not taken, and the inference is that he could give no information on the subject. The only other testimony in the case which can tend to show that the claim of the appellee was intended to be concluded or affected by the award is the deposition of his mother, Kitty Cornwell, who says the arbitrators, in their award, at her instance, introduced Prucy and her children, as she believes.

This evidence of the contents of the last award is altogether too vague to conclude and defeat the claim of the appellee; and I think the Circuit court was right in the opinion that "the slaves were left unaffected and undisturbed by the said decree, in the hands of Thomas Nelson, the executor, who held the same until his death."

I also think the Circuit court was right in the opinion that, even if the award and decree were as contended for by the appellant, "they were produced as the consequence of an improvident submission to arbitration of the interests which the said Nelson was holding as executor of Constance Cornwell

and agent of the legatee; he, the said Nelson, holding as executor a title in the slaves, shown to have been incontrovertible, and free from all question, in law or in equity, and which ought not, therefore, to have been submitted to arbitrators, to be decided upon according to their vague and undefined and uncontrollable notions of law and equity": that such submission was a *devastavit* in the executor, for which he was answerable to the legatee, if thereby the slaves were lost to the latter. And "that as the result of the said award and consequent decree has been to leave the slaves in question in the undisturbed possession of the said Nelson, who, it is contended, became the entire owner absolutely of the same, the legatee is not deprived of his recourse upon them, notwithstanding the award made under such improvident and wrongful submission."

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It is stated in the petition for the appeal that this case is believed to be the first instance in which an executor, acting *bona fide*, has been held responsible for an award under a submission made by him. And it was argued by the counsel for the appellant that so unreasonable a doctrine ought not to be sustained.

It would be difficult to maintain that the executor acted *bona fide* in this case in making the submission, if the award was in pursuance thereof, and the effect of it would be to conclude the claim of the appellee to the slaves, and invest the executor individually with the absolute ownership thereof. The circumstances under which the submission was made have been already sufficiently stated.

But is it true that an executor or administrator will be responsible for a *devastavit* in no case in which he acts *bona fide* in making the submission? In a case decided in 15 Elizabeth, and reported in 3 Leonard 53, it was held that an executor may, as such, submit to arbitration. But if the arbitrators do not award as

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much as he would be entitled to at law, it will be a *devastavit* for the residue; for the submission was his own act. The principle declared in that early case has been recognized in many subsequent cases, and denied in none that I have ever seen. It is stated as the settled doctrine in all the digests and abridgments of the law, and in all the elementary works on the subject. Comy. Dig., Administration, I. 1, Assets, C; Viner's Abr., Executors, G a 3; 1 Bacon's Abr. 314, Arbitrament and Award, C; 1 Dana's Abr., C, 13, Art. 2; Russell on Arbitration, p. 36, 63 Law Library 84; 1 Lomax on Ex'ors 356. The doctrine was expressly admitted by two of the judges of this court in *Wheatley v. Martin's adm'r*, 6 Leigh 62. And in the opinion of Judge Cabell in that case is contained a clear summary of the law in regard to the powers and responsibilities of executors and administrators in this respect. While the power of an executor or administrator to refer to arbitration results from his power to settle all claims due to or from the estate he represents, and while the award is binding on him in his fiduciary character, and, so far as relates to debtors and creditors, parties to the award, is binding on legatees and distributees in the same manner as if the settlement had been made by him without an award; yet, if injury has been done to legatees and distributees by the award, it may be redressed by charging it as a *devastavit* by him on the settlement of his accounts. Id., p. 71. The burden of proving such injury would of course devolve on the party complaining of it, and every fair presumption would be made in favor of the award. This doctrine has been altered by the Code, p. 611, § 5; which, however, does not apply to this case.

The reason assigned for the doctrine in the case in Leonard was that the submission was the executor's own act. While he has the power to submit, as a

means of settlement, he is not bound to do so; and the award, therefore, before the law was altered by the Code, gave him no more protection against the consequence of paying an unjust claim than his voluntary settlement would have done. An award in pursuance of a submission, if there be no error apparent on its face, and in the absence of fraud or mistake, is conclusive. However incompetent the arbitrators may be, and however grossly they may err in their judgment of the law or fact, there can be no appeal from their decision. It may have been considered unsafe and dangerous to permit an executor or administrator to refer to the final arbitrament of such judges a controversy affecting the estate of his decedent, without holding him liable for a *devastavit* if any injury resulted to the estate from the award. But whether the doctrine was reasonable or not, and what were the reasons on which it was founded, are immaterial enquiries, if I am right in saying that it was well settled.

The result of its application to this case is that the appellee is entitled to recover the slaves in controversy, notwithstanding the award, if he has shown that he would have been so entitled if no such award had been made; and that he has so shown, I think, sufficiently appears from what has already been said. The award and decree thereon may, therefore, be put out of the case; and the only remaining question is:

Fourthly. Whether the claim of the appellee is concluded by the act of limitations, or by acquiescence or laches on his part.

The claim is certainly not barred by the act of limitations. The executor never held the slaves adversely to the appellee, at least before the decree of 1844, and this suit was brought in 1847. Nor is it concluded by acquiescence or laches on his part. He left the state in 1828, two years before he arrived at age, and was not heard of for many years thereafter. It does not ap-

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pear where he was until 1839, since which time he has resided in Georgetown, D. C. It does not appear that he was ever informed by the executor, Nelson, or any other person, or had any knowledge of the pendency of Kitty Cornwell's suit, or of any of the proceedings therein. She says that at the time the suit was brought she believed that he was dead, or had gone where she would never see or hear from him again. Her interest in regard to the slaves was adverse to his. She was interested in setting up and enforcing the award of 1829, which declared Betsy and her increase to be hers, and the slaves in controversy to be a part of her father's estate, of which she was one of the distributees. It is true that before he left the state the executor seems to have accounted with him for the horse bequeathed to him by the testatrix; and he was doubtless aware of the legacy of the slaves. But by the terms of the will the slaves were not to be delivered to him by the executor until he was of age; and if he attempted to sell them, they were to be free. Whether the latter condition was valid or not, he probably believed it to be so, and the effect was the same. They were chargeable slaves, incapable, it seems, of producing any hire; and they were in the care of one whose relation to them gave assurance that they would not be neglected. It may have been inconvenient or illegal to remove them to his place of residence. Under these circumstances, it was natural and reasonable that he should permit them to remain in the possession of the executor. His having done so from the time of his arrival at age, in 1830, until the institution of his suit in 1847, a period of seventeen years, is not of itself sufficient evidence of acquiescence, or sufficient laches, to conclude his claim, and entitle the executor to the slaves in his own right. The evidence against him afforded by the lapse of time is repelled, and not strengthened, by the surrounding circumstances.

There is no evidence that the executor ever held, or claimed to hold, the slaves adversely, unless it can be found in the award and decree of 1843 and 1844, the effect of which has been fully considered. On the contrary, he continued to affirm that he held them as executor of Constance Cornwell, or as agent of the appellee, down to a recent period before his death.

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I think there is no error in the decree, and that it ought to be affirmed.

DANIEL, *J.* dissented on the last ground stated in the opinion of the court. He thought the appellee was barred by his laches.

DECREE AFFIRMED.

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1. In a chancery cause, if upon the state of the proofs at the time an issue is directed, the bill should be dismissed, it is error to direct it: And although the issue is found in favor of the plaintiff, the bill should, notwithstanding, be dismissed at the hearing.
2. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and corroborating circumstances, in support of the bill, it is error to direct an issue. The *onus* must be shifted, and the case rendered doubtful by the conflicting evidence of the opposing parties, before an issue should be ordered.
3. Declarations of a person who has been the agent in procuring a deed for another, made either before the negotiation for the deed was commenced, or after the execution of the deed is completed, are incompetent evidence against the grantee in the deed, to show that provisions which were intended to be inserted in the deed have been fraudulently omitted.
4. But acts and declarations of such person, done or made whilst the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to show the fraud.
5. The declarations of the grantor in a voluntary deed, made after its execution, are not competent evidence against the grantee, to show that provisions which were intended to be inserted in the deed have been fraudulently omitted.
6. Nor are the declarations of the grantor, made before the execution of the deed, competent evidence against the grantee, in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured.
7. A conveyance of land and slaves, upon a trust to permit the slaves to live upon the land and take the profits of the land and of their own labor to their own use, they still continuing to be slaves, is null and void, and passes nothing to the grantee or to the slaves.

The first of these cases was a suit in equity in the Circuit court of Hanover county, instituted by Betty and others, suing *in forma pauperis*, against William C.

Smith in his life time, and revived against his personal representative, to recover their freedom. The bill was filed in January 1835, and set out that William Gooch, late of the county of Hanover, the father of several of the plaintiffs, the children of Betty, being an unmarried man, and being anxious to secure to the plaintiffs, to whom he stood in the relation of a master, but particularly to Betty and her children, the full enjoyment of that liberty which he had always permitted, and intended them always to enjoy, but being an extremely illiterate and uninformed man, applied to one William C. Smith to counsel and advise him as to the best mode of effecting this wish, and the further design which he entertained of devoting the whole of his property to the plaintiffs; and it was determined to vest the whole legal title to the persons and property aforesaid in the said Smith, for the purposes aforesaid. That in pursuance of this purpose a deed was executed. That this was the sole consideration and purpose of the deed, though by the fraud of Smith this purpose is omitted to be expressed in the deed. That this fraud was perpetrated, as they believe, by falsely reading the deed to Gooch, who therefore did not know its contents and real character, but thought he had only made a will.

They further state that when the deed was first executed, Smith admitted, as he had since done, the true purpose for which it was made; but a short time afterwards, Gooch being informed that Smith would claim the subject of conveyance as his own, he executed another paper, which they exhibited, in which he declares the real intent and purpose of the conveyance aforesaid, which he calls his will, and directs that all control over the subject shall be taken from Smith, if he attempts to hire out or sell any of his negroes, or to sell his land.

They further state that Gooch died in the spring of
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the year 1832, and that Smith permitted the plaintiffs to remain in possession of the land and other property left by Gooch, and employed Jesse Barker to superintend and manage the whole, until recently, when he had set up a claim to the plaintiffs and the property; had sold that which was perishable, and had rented out the land; and had attempted to sell some of the plaintiffs; and threatened to sell the land and the plaintiffs, and would without doubt do so unless restrained by an order of the court.

The prayer of the bill was that Smith might be enjoined from selling or hiring them out, or otherwise molesting them, until the matter could be heard; and that they might be protected in the enjoyment of the land until their rights were ascertained, and they were fully emancipated.

The deed from Gooch to Smith bears date the 21st of April 1831, and for the love and affection he has for Smith, and for divers acts of kindness and favor done by the said William C. Smith, and for the further consideration of one dollar, he conveys to him, with general warranty, his land, his slaves, and all his property of every description; but with a condition that Gooch shall keep possession, and have free use and enjoyment of all the property named in the deed, for his life; and at his death Smith shall have the land, slaves, and their future increase, and all other property of every description, both real and personal, which Gooch may have or possess at the time of his death.

On this deed was endorsed the certificate of the deputy clerk of the County court of Hanover, that it was acknowledged in his office by Gooch on the day of its date.

The other paper exhibited with the bill was executed by Gooch, and bears date the 10th of November 1831. In it he says: I, William Gooch, being willing that William Smith should hold all my people

and plantation according to my will, which is recorded in Hanover office ; but if he should attempt to hire out, sell, or convey any of said negroes, or sell my land that I have for my said negroes, I wish it to be taken from him, and put in the hands of Jesse Barker immediately ; that it never was my intention for any of my negroes to be sold or hired.

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William C. Smith answered the bill. Referring to the deed of April 21st, 1831, he says: So far as the bill seeks to charge him with any fraudulent or unfair transaction, either in the procurement or execution of the said deed, or in obtaining the property thereby conveyed, he denies the statement and charges of the bill, and avers that they are utterly false. That he was particularly acquainted with Gooch, and had rendered him many acts of kindness. Amongst other things done by him in that way, he permitted Gooch to retain in his service a negro man slave named Reuben for the space of five years ; and that slave having fallen into bad health, at the request of Gooch, he took said slave home, and permitted Gooch to have in his place another slave named Aaron, who was retained by him until his death, a period of four years. That Gooch had the services of these slaves for nine years, and never paid to the defendant a cent for them. Gooch had also the use of a mare of the defendant for some length of time. That these facts might and probably did operate on Gooch in making the disposition of his property in said deed.

He further stated that the deed had been acknowledged by Gooch before the clerk in his office. That the defendant was not present either at the execution or acknowledgment of the deed, and had no participation in either ; and that on the 25th of January 1830 Gooch had executed another deed, in all its provisions like that exhibited with the bill. That this deed was also executed in the absence and without

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the agency of the defendant, was attested by three witnesses, two of whom were yet living; and was found by the defendant amongst the papers of his father, Charles Smith, one of the attesting witnesses.

He denied that Jesse Barker had held the property for the defendant up to the time of filing the bill: he was employed to do some work upon the farm, but never had permanent occupancy of it. He questions the right of the plaintiffs to impeach the provisions of the deed, as, whether valid or not, they can have no right to freedom under or against it.

The deed of the 25th of January 1830 is, as to its provisions, a duplicate of that of February 21st, 1831; and it is attested by Charles Smith, Joseph Ladd and William L. Dennett.

The second of these suits was instituted in March 1837, in the same court, by Littleberry Thurman and others, heirs and next of kin of William Gooch, against William C. Smith, for the purpose of setting aside the deed of April 21st, 1831, and recovering the property. They charge that the deed was fraudulently procured by misrepresenting its contents, and stating its purport to be altogether different from what it really was.

Smith in his answer averred that the charge in the bill was altogether groundless and untrue. He says that he had nothing to do with the drawing and preparing the deed, and was not present when it was prepared and executed, or when it was placed on record. That Gooch was much attached to him, and had for many years before his death declared that he intended to give him all his property at his death; that he had determined that his relations, who had neglected him, should have none of it; and he voluntarily employed a highly respectable gentleman to prepare said deed for him. That there was no consideration moving Gooch to execute the deed but

his attachment to and friendship for the defendant for his many acts of friendship rendered to said Gooch for a series of years, unless he considered that the various sums of money lent him, amounting to six or seven hundred dollars, was a consideration in part.

On the 17th of April 1840 the court made a decree in both causes, that an issue be made up and tried by a jury at the bar of the court, to ascertain and determine: First. Whether the deed of the 21st of April 1831 was acknowledged by William Gooch with a full knowledge of its contents and legal effect, and with intent to convey and pass to William C. Smith the negro slaves in the said deed mentioned, as his absolute property. Secondly. If the said deed was so executed and acknowledged by the said William Gooch, whether it was obtained by William C. Smith, or by any one acting for and on his behalf, by fraud and circumvention. Third. If the said deed was not executed and acknowledged by the said Gooch with intention to convey and pass the negro slaves therein mentioned to the said William C. Smith, as his own absolute property, whether it was executed and acknowledged by the said Gooch as a deed to emancipate and set free the said negro slaves, and with intent that it should be a deed for that purpose.

At the time the issue was directed the evidence in the record showed that the deed of April 21st, 1831, was written by Charles Smith, the father of William C. Smith, and that Charles Smith went with Gooch to the clerk's office when it was acknowledged there by Gooch; that Gooch was very ignorant and illiterate, unable to write; and that Charles Smith had borrowed money from Gooch, and owed him five hundred and fifty dollars, for which he (Smith) had executed to Gooch his bond. A witness (George Turner) testified that he saw Charles Smith and Gooch, and Smith said he was going to carry a conveyance of Gooch's pro-

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perty, and that he (Smith) was to stand master for the negroes, provided he should be the longest liver. And he further stated that Gooch was so drunk the witness could not understand anything that he said. Another witness (Wat. H. Tyler) stated that he met Charles Smith and Gooch on their return from the courthouse; that Gooch had been drinking, and witness was told by Smith that Gooch had fallen out of the gig; that they both said that Gooch had been to the office, and Smith said he had been with him, and Gooch said he had fixed his business. These witnesses stated that before the execution of the deed they had heard Gooch say he never meant to make his people slaves, but meant to get a man to act for them, and that they were to remain on the place. Tyler says he named William C. Smith, but Turner says he never heard him mention William C. Smith as such agent, but Gooch often told him that his cousin, Charles Smith, was to act. Another witness (Kally Tucker) stated that on the night before Gooch died he told the witness that everything was given to William C. Smith, but he was not to carry the negroes off the place. There were other witnesses, who testified as to Gooch's declarations that he did not intend to make his negroes slaves, and that he intended to get some man to stand master for them. Some of these slaves, it was proved, he stated were his own children. And Turner stated that Gooch came to him and told him that he had understood that the conveyance he had made to Charles Smith was made to William C. Smith, and that he wanted, if that was so, to make a conveyance to Jesse Barker to keep his people on the place, and not make slaves of them: And that at the request of Gooch witness drew an instrument of writing to that effect.

There was also evidence as to the declarations of Charles Smith. Charles Barker testified that when

Charles and William C. Smith were taking an inventory of the property, after Gooch's death, Charles told the plaintiff Betty to bring all the things; they were hers. Another witness stated that Charles Smith told him that he put a negro named Reuben into the possession of Gooch for the interest of five hundred dollars, which Smith had borrowed of Gooch, and that, he being in bad health, he had taken him home and put Aaron in his place. And there was evidence of similar statements by Gooch. Nathaniel White testified that he proposed to buy Lucy, one of the slaves, from Charles Smith, and he replied that William C. Smith could not and should not sell her.

The declarations of Gooch and Charles Smith, made before and after the execution of the deed of April 21st, 1831, and also the paper filed with the bill, were excepted to by Smith as incompetent evidence. The other evidence in the cause is stated by Judge *Daniel* in his opinion.

The issues directed were tried in October 1848. The evidence excepted to as before stated was offered in evidence by the plaintiffs, and, though objected to by the defendant, was admitted by the court; and the defendant excepted. The jury found: First. That the deed from Gooch to William C. Smith, dated 21st April 1831, was executed without a knowledge of its contents and legal effect, and that he did not intend to convey to said Smith an absolute title to the slaves mentioned therein. Secondly. That the said deed was procured for said Smith by his father, Charles Smith, by fraud. Thirdly. That the said Gooch intended to emancipate the said slaves by the said deed.

There was a motion to the court for a new trial, which was overruled; the court being of opinion that it had no power, sitting as a court of law, to grant such new trial. The defendant thereupon moved the court to certify to the court directing the issues in

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these causes, along with the verdict of the jury, the facts proved upon the trial, and also the bill of exceptions filed by the defendant; but the court being of opinion that it was not competent to the court to make any such certificate, overruled the motion, and certified the verdict and bill of exceptions. There was then a motion, on the equity side of the court, to set aside the verdict and award a new trial on the issues directed; which was overruled. And in June 1852 the court made a decree emancipating the plaintiffs in the first suit, and their descendants born since the institution of the suit; and that the deed of April 21st, 1831, be set aside and canceled, as having been obtained fraudulently by Charles Smith. The defendant thereupon applied to this court for an appeal, which was allowed.

Griswold and *R. T. Daniel*, for Smith's adm'r.

Young and *Lyons*, for the paupers.

Crumpp, for the Thurmans.

DANIEL, *J.* In the case of *Pryor v. Adams*, 1 Call 382, this court held that it was its duty, in reviewing a decree founded on the verdict of a jury, rendered on an issue out of chancery, to look to the state of the proofs existing at the time when the issue was ordered; and, if satisfied that the chancellor had improperly exercised his discretion in directing the issue, to render a decree, notwithstanding the verdict, according to the merits, as disclosed by the proofs on the hearing when the issue was ordered. The rule has been followed in several cases since, and in the recent case of *Wise v. Lamb*, 9 Gratt. 294, its propriety was fully recognized and vindicated in the opinion of the court, delivered by Judge Lee: And the elaborate review there made of the precedents ascertaining the principles that should guide the discretion of a chancellor in deter-

mining on the propriety of ordering an issue, precludes the necessity of our entering on such a task here.

Upon the authority of the two cases just mentioned, and those cited in the opinion delivered in the latter, it may be considered as well settled that in no case ought an issue to be ordered merely to enable a party to obtain evidence to make out his case; that when the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and strong corroborating circumstances, in support of the bill, it is error in the chancellor to order an issue; that no issue should be ordered until the plaintiff has shown enough to throw the burden of the proof on the defendant; that until the *onus* is shifted, and the case rendered doubtful by the conflicting evidence of the opposing parties, the defendant cannot be deprived, by an order for an issue, of his right to a decision by the court on the case as made by the pleadings and proofs.

To apply these rules to the cases under consideration is, in the view which I have taken of the state of the proofs when the issues were ordered, to decide their fate.

Much of the testimony offered in support of the bills is of a character to forbid its being followed as a guide to judicial action in any case without the strictest scrutiny, consisting as it does mainly of supposed admissions and declarations, deposed to by ignorant and illiterate witnesses, many years after such admissions and declarations are said to have been made. And a portion of it is of a character to be excluded altogether, on the score of incompetency.

I cannot perceive on what ground declarations of Charles Smith, made long before the execution of the deed of the 21st April 1831, and before there was any treaty or negotiation in relation to the subject matter conveyed, can be received to impeach the deed, or to

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affect injuriously, in any manner, the rights of William C. Smith, the grantee. Nor can I see why William C. Smith should be held responsible for any declarations of Charles Smith, made after the deed was executed and recorded, and the whole transaction in relation thereto perfected and ended.

In his answer to the bill in the first of these cases William C. Smith denies expressly that he was guilty of any fraud in the procurement or execution of the deed, or in obtaining the property thereby conveyed; and in his answer to the bill in the second case, after again explicitly denying all fraud, he avers that he had nothing to do with the drawing and preparing of the deed, and was not present when it was prepared and executed, or when it was placed on record. He further states that he is informed and expects to prove that Gooch, the grantor, was much attached to him, and had for many years before his death declared that he intended to give him all his property at his death; that he had determined that his relations, who had neglected him, should have none of it, and that he voluntarily employed a highly respectable gentleman to prepare the deed for him; and that, as far as he (the respondent) knew, there was no other consideration moving Gooch to execute the deed but his attachment to and friendship for him (the respondent), for his many acts of friendship rendered said Gooch for a series of years, conducive to his comfort and convenience; unless he considered that various sums of money lent him, amounting to six or seven hundred dollars, was a consideration in part.

And there is an entire absence of any proof to show that William C. Smith had anything to do with the procuring, executing, or recording of the deed. If any improper inducement was held out, or false representation made, or art, device, or fraud practiced, by Charles Smith, in the procurement or execution of the

deed, there is nothing to show that William C. participated in it or had any knowledge of it. No concert, agreement, or understanding in relation to the transaction between the two Smiths is established. Charles is no party to the deed, and William C. claims no title through him. It is true there is proof going to show that Charles advised and aided in the execution of the deed, and William C. is the grantee, and has accepted it and claimed under it.

In this state of facts, anything said or done by Charles Smith during the transaction, and in reference to it, may be properly treated as part of it; and William C. Smith is bound by it. It may be very properly said that, claiming the benefit of the transaction, he must take it as a whole. But there is no relation between the parties which justifies us in holding him bound by any acts or declarations of Charles, which were not strictly parts of the *res gestæ*. Any act done by Charles Smith, before the transaction commenced, or after it was finished, tending to impeach, or cast suspicion on, its fairness, cannot be regarded otherwise than as *res inter alios acta*. And proof of any declarations made by him of a like tendency, at any time, except pending the transaction, is but hearsay.

Much of the testimony in relation to the declarations of Gooch, the grantor, is liable to a like objection. His declarations, made after the execution of the deed, fall within the influence of the well established rule, that no admissions or declarations, in whatever form, of a party to a sale or transfer, made after such sale or transfer, and going to destroy and take away the vested rights of another, can *ex post facto* work that consequence, or be received as evidence against the vendee or assignee. 5 John. R. 426; *Pettit v. Jennings*, 2 Rob. R. 681.

Whether his declarations made before the commencement of the transaction were properly received,

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in the first of these suits, I have not thought it necessary to examine with much particularity, for reasons which will hereafter appear: Though I am strongly inclined to the opinion that they were not. Be this as it may, I think it clear that such declarations are not evidence for the plaintiffs in the second suit. To receive them as evidence to vacate the deed, and to cast the property on the heirs and next to kin, would be equivalent to permitting a party to testify in his own behalf.

These rules necessarily exclude from the second case the whole of the depositions of Kalley Tucker, Anderson Tucker and George W. Barker, and a large portion of the several depositions of William E. Tyler, George Turner and Nathaniel White. The paper B ought also, I think, to be excluded from both cases, being nothing more than a subsequent written declaration of Gooch, by which he endeavors to destroy the legal force and effect of his deed, executed some six months before.

Any further designation of the portions of the evidence in behalf of the paupers which ought to be treated as incompetent is, in the view which I have taken of it, unnecessary. For, looking upon the testimony in support of their claim as a whole, it appears to me vague, conflicting and inconclusive, and as tending (so far as it points to one result rather than another) to make out a case which could be of no benefit to them. So far as it goes to establish any purpose on the part of Gooch, inconsistent with the deed, it tends to prove, not that he designed to confer on them a state of absolute freedom, but that he designed to leave them in a qualified condition intermediate between absolute slavery on the one hand and absolute freedom on the other; in which, whilst they might enjoy many of the rights and privileges of freed men, the relation of master and slave between Smith and

them might be left subsisting, so far at least as to shield them from the penalties which would otherwise attach to their residence in the state as free negroes.

Such a purpose is in conflict with the policy of our laws, and this court has uniformly refused to recognize it, no matter how solemnly expressed or clearly proved, as conferring any rights or benefits on the slave. *Rucker's adm'r v. Gilbert*, 3 Leigh 8; *Wynn v. Carrell*, 2 Gratt. 227.

In the case last cited it was, however, also declared, that when by will slaves are bequeathed to a legatee, to be held by him in such a qualified or intermediate condition, that the whole provision is void, and that the slaves (if there is no other disposition of them in the will) stand as if the testator had died intestate in respect to them.

It becomes, therefore, important to look further into the state of the proofs in the second suit, and to see whether, as between the parties thereto, there was sufficient testimony to justify the chancellor in ordering an issue.

Throwing out of view the testimony which I have treated as incompetent, there remains proof, to be found in the depositions of White and others, that Charles Smith borrowed of Gooch, some years before his death, money at different times, amounting in all probably to five hundred and fifty dollars, and that about the date of the last loan a negro man Reuben was placed by Charles Smith in the possession of Gooch, where he remained for some years, when, being taken sick, his place was supplied by another negro man Aaron, who remained in the service of Gooch probably till his death. This testimony was no doubt offered, in connection with certain declarations of Gooch, (to the effect that these negroes were placed with him by Charles Smith, to discharge, by their services, the interest on the money loaned,) for the

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purpose of falsifying that portion of the answer of William C. Smith to the bill of the paupers, in which he states that he had permitted these slaves to remain in the possession of Gooch without compensation, and suggests this act of kindness on his part towards Gooch as one of the motives which probably induced the latter to make the deed in his favor. It is hardly necessary to say that this testimony, apart from the excluded declarations, whilst tending to establish the conclusions sought to be drawn from it, is yet wholly insufficient for the purpose. The fact that Charles Smith borrowed money of Gooch, and placed these slaves in his possession, is not inconsistent with the idea that they may have belonged to William C., and that he had, as an act of friendship, permitted Gooch to enjoy their services without compensation.

There yet also remains in the cause the deposition of Foster Higgins, who states that he was at the house of Gooch, and was called on by him and Charles Smith to witness a will, as they said, the day before they went to Hanover clerk's office to record the same; that Smith and Gooch said the negroes were to be kept on the land, and that Smith was to act as master for them. And that Gooch, some time after his return from the office, said that he had acknowledged the will that he (the witness) had witnessed.

There is also the deposition of Jesse Barker, who states that William C. Smith employed him to act as master for the slaves, stating that the law required some person to do so; that he (Smith) lived too far off to attend to them; that he did not wish to be pestered with them; and that the slaves were to support themselves by their own labor.

There is also the testimony of George Turner, who states that he met Gooch and Charles Smith, as they were going to Hanover court-house, and that Smith said they were going to record a *conveyance* of Gooch's

property, and that he (Smith) was to stand master for the slaves, provided he should be the longest liver: And he also states that Gooch was then very drunk.

Another witness (W. E. Tyler) states that he met Gooch and Smith as they were returning from the court-house; that he thought Gooch had been drinking, but did not think him drunk.

This, together with the fact, which is very fully established, that Gooch was an ignorant and illiterate man, constitutes (with the exception of the testimony excluded) substantially the evidence in behalf of the plaintiffs in the second cause.

It must be conceded that it does tend to excite the suspicion that all was not fair; that Gooch intended to leave to his negroes his land after his death, and to allow them to live upon it and enjoy the fruits of their own labor, under the supervision of Smith, who should stand as master for them, so as to prevent their being subjected to the operation of the laws with respect to the residence in the state of free negroes; that he designed to express and effectuate his intentions by means of a will; and that Smith, whose aid and advice he sought, fraudulently palmed upon him the deed under consideration, by falsely representing and reading it to him as a will expressing his intentions.

But when we come to examine the proofs on the other side—the fact that the deed was regularly acknowledged by the grantor before the clerk of the county, whose position, in the absence of proof to the contrary, is a guaranty that he was an intelligent and honest man, who would not have taken the acknowledgment until first satisfied that Gooch was in a condition to understand what he was doing; that Gooch had, the year before, executed a deed containing exactly the same provisions, in the presence of witnesses, who attested it by his request, one of whom states that the grantor told him that the deed

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was as he wanted it; that after consulting counsel as to whether the slaves, if emancipated, could remain in the state, and being informed by him that they could not, the grantor had declared that the slaves would prefer being servants to any good man to being sent off to a free country; that he had declared that the plaintiffs should never have any of his property, and frequently said that he intended to give it to the grantee, Smith—if any doubts or impressions, unfavorable to the fairness of the transaction, still remain, they ought, I think, to be treated as falling far short of that judicial doubt, as to the preponderance of conflicting proofs, which alone could justify a chancellor in calling in the aid of a jury.

Several grounds for reversing the decrees, taken here by the counsel of Smith, which might otherwise have been well worthy of consideration, have been passed over, in as much as the result of the views already presented is to terminate the controversy in his favor.

I see nothing in the character of the claim or nature of the controversy, in either case, calling for the application of rules in respect to the ordering of the issues different from those prevailing in other chancery causes: And I think that the decree should be reversed and the causes remanded, with instructions to the Circuit court, after taking the proper steps for ascertaining and collecting in the fund arising from the rents and hires, to decree its payment to Smith's representatives and heirs or devisees, according to their respective rights, and to dismiss both bills.

LEE and SAMUELS, *Js.* concurred in the opinion of *Daniel, J.*

MONCURE, *J.* concurred in so much of the opinion as reverses the decree in favor of the paupers, and dismisses their bill, on the ground that they were not in

tended to be free. But he thought that the deed was either obtained by fraud or on a secret trust in favor of the slaves: And there was sufficient evidence to authorize an issue in the second suit.

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ALLEN, *P.* concurred with Judge *Moncure*. As to the heirs and next of kin, it was proper to direct an issue upon slight proof, in analogy to the proceedings in the case of a will. But in fact the proof was strong.

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The decree was as follows :

The court is of opinion, that the testimony offered to impeach the deed of the 21st day of April 1831 was insufficient for the purpose; and that the said deed should have been treated by the court below as a good and *bona fide* conveyance, investing the grantee, William C. Smith, with a full and absolute title in and to the land, slaves and other property in said deed mentioned.

And the court is further of opinion, that the decree of the 17th day of April 1840, directing certain issues therein mentioned to be made up and tried, is erroneous; and that the chancellor, instead thereof, ought to have rendered a decree sustaining the said deed; and that after collecting in the fund arising from the rents and hires, and ordering the same to be paid to W. C. Smith, he should have proceeded to dismiss the bills in each case; the bill of the paupers without costs, and the bill of L. Thurman and als. at the costs of said last mentioned plaintiffs.

And the court is also of opinion, that the Circuit court erred in its decree of the 22d of June 1852; and that, instead of rendering such decree, the said court ought still, and notwithstanding the verdict on the issues, to have observed the course above indicated as proper for the chancellor when he made his decree

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of the 17th April 1840. The court is also of opinion that the order of the 7th of October 1843 is erroneous. Said decrees in each case reversed; those in behalf of the paupers without costs; those in the second case with costs to the representative of W. C. Smith, as the party substantially prevailing.

And the causes are remanded, with instructions to the Circuit court to take proper steps for calling in the fund arising from the rents of the land and the hires of the negroes; and to make a decree, directing the payment of so much thereof as has accrued from the heirs to W. C. Smith's representative, after first deducting therefrom the expenses, if any, incurred in the maintenance of any of said paupers pending this suit; and apportioning so much thereof as has accrued from the rents among the representatives and the heirs or devisees of said Smith, according to their respective rights. And then to dismiss both bills; the bill of the paupers without costs, and the bill of Thurman, &c., with costs to Smith's representative.

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1. In construing a provision in a will, the whole instrument is to be looked to, to ascertain the intention of the testator.
2. Testator devises the whole residue of his real and personal estate to B and L, in trust, that his niece Ann shall have the whole profits during her life, for the support of herself and her son J. At her death the trust to cease, and the estate to go to J and his heirs, if he survived his mother; if he died before her, to his children, if he left any. If J die before his mother, without children, and she have other children and die, they to take the same estate which J would have taken if he had survived her. But if Ann and J die without children to inherit the estate, then the estate to go to L and his heirs. Testator authorizes Ann to sell the land and slaves, if necessary for her comfort, with approbation of B and L, and purchase other property, which is to be in the same situation, and to descend in the same way as that left to Ann and her son, in the event of their death. **HELD:** Upon J's surviving his mother, he took the absolute fee; and there is no further limitation of the estate in that event.

This was a writ of forcible entry and detainer, brought in the County court of Prince William, and removed to the Circuit court of the same county, by James Purcell against George W. Cheshire. Both parties derived their title from the will of Francis Cannon. By his will, after giving certain slaves to two of his nephews, and emancipating two other slaves, the testator says:

"All the residue of my estate, of every description, consisting of land, negroes, stock, &c., &c., I leave to my nephews, Barnaby Cannon and Luke Cannon, junior: In trust, nevertheless, for the following uses, interests and purposes, viz: That my niece, Ann Sowden, shall have the entire use and the profits of the same during her natural life, for the maintenance and sup-

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port of herself and her son, John Sowden. At the death of the said Ann, it is my will that the said trust shall expire, and that the estate here left in trust shall go to the said John Sowden and his heirs forever, should he survive his mother; or if he should die before her, then to his children, if he should leave any. If the said John Sowden shall depart this life before his mother, and should have no child, and the said Ann Sowden should have other children and die, it is my desire that they should take and enjoy the same estate which her son John would have taken provided he had survived his mother. But if the said Ann Sowden and her son John shall both depart this life, without leaving children to inherit the said estate, in that case it is my will that at the death of the said Ann Sowden and her son John, the estate here left in trust shall go to my nephew, Luke Cannon, junior, and his heirs forever. As in leaving a portion of my estate to my niece, Ann Sowden, for her life, I had in view her ease and comfort, I think proper to stipulate, that in the event of any of the negroes left her becoming refractory and disobedient, or the land so unproductive as to make it either necessary or desirable to her to sell or exchange them for other property of the same kind, I hereby authorize her to do so, with the consent and approbation of my trustees, or the survivor of them, hereinbefore named; recommending it to her, however, to exercise this power cautiously and with a sound discretion. And it is furthermore my will and intention, that the property so exchanged for, or purchased by, the said Ann Sowden and my trustees aforesaid, shall be considered precisely in the same situation, and subject to the same course of descent, with that which I here leave to the said Ann Sowden and her son, John Sowden, in the event of their death."

Ann Sowden died, leaving no other children but John

Sowden; and he afterwards died leaving no child, and never having had any. Luke Cannon, junior, died after the testator and before the institution of this suit, leaving heirs. Purcell claims under a conveyance from John Sowden; Cheshire claims under a lease from the heirs of Luke Cannon, junior. And it was agreed that Purcell was in possession and that Cheshire forcibly entered upon and ousted him.

The case was submitted to the court below upon the facts agreed; and that court gave a judgment in favor of Purcell. Whereupon Cheshire applied to this court for a *supersedeas* to the judgment, which was awarded.

Patton, for the appellant.

Morson and Williams, for the appellee.

ALLEN, P. The decision of this cause depends upon the construction of the will of Francis Cannon deceased, disposing of the property in controversy. The intention of the testator must be gathered from the face of the will itself: In the enquiry we can derive but little aid from adjudged cases. In *Shermer v. Shermer's ex'ors*, 1 Wash. 266, Pendleton, president, quotes with approbation the saying of a judge, "that in disputes upon wills, cases seldom elucidate the subject, which, depending on the intention of the testator, to be collected from the will and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case." And Judge Pendleton remarks, that "he had generally observed that adjudged cases have more frequently been produced to disappoint than to illustrate the intention."

In the case under consideration, looking at the different clauses under which the parties respectively claim, and considering each clause apart and uninflu-

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enced by the other clause and the residue of the will, it is apparent that under the second clause, standing alone, John Sowden, if he survived his mother, would have taken the absolute estate; whilst the clause, under which the plaintiff in error claims, providing for the contingency of the death of Ann Sowden and her son John, without leaving children to inherit the estate, and in that case giving the estate over at their death to his nephew, Luke Cannon, junior, and his heirs, would, if standing alone, have been a good executory limitation of the fee to Luke Cannon, junior, in derogation of, or substitution for, the preceding estate in fee. But the intention of the testator is not to be collected from any isolated clause, but from the whole will, so as to ascertain, in the event which has happened, whether it was provided for, and what disposition in view thereof the testator contemplated. The relative situation of the parties and the state and circumstances of the case, appear upon the face of the will only. From that it is evident that his niece, Ann Sowden, and her son John were the leading objects of the testator's bounty. It does not appear that she then had any other children. After some specific legacies to his two nephews, and a provision emancipating some slaves, he bequeathed the residue of his estate to trustees, in trust, that his niece should have the entire use and profits of the same during her natural life, for the maintenance of herself and her son John. Having thus secured a support for his niece, and protected the property from waste by the interposition of trustees during her life time, in the following clause he directs that at her death the trust should expire, and the property left in trust should go to John Sowden and his heirs forever, should he survive his mother. But looking to the possibility of his dying before his mother, leaving children, and intending to secure a fee simple estate

to John and his children, if John survived, or left any child capable of taking, at the death of the mother, he in the next place provides, that if John should die before her, the estate should go to his children, if he should leave any. These clauses show an intention to provide for John and his children after the trust was satisfied; that he looked alone to the death of his niece as the time when the whole estate was to pass to some one or more of the designated beneficiaries; that John, in the event which has happened, was the first beneficiary; and that after the estate once vested in him, there was no intention to make any limitation over, or to tie up the property in his hands. Otherwise, although he might have survived his mother and had children, yet, as he might have outlived them, he could not have exercised full dominion over the property. This intention more clearly appears from the next provision of the will. Having fully provided for the niece and her son during her life time; for the son, if he survived her, giving him the whole estate; for his children, if he died before her, giving them in that event the whole estate, although one degree farther removed from him; he in the next place looked to and provided for another contingency; that was the death of John before his mother, leaving no child. In that event, he directs the estate to go to any other children of said Ann Sowden at her death, who should take and enjoy the same estate which her son John would have taken provided he had survived his mother. The devise to the other children of Ann is upon the contingency of John's dying before his mother, leaving no child. He makes no devise over to these other children of Ann, if she should have any, provided John survived his mother, and then died leaving no child; because he had before given the whole estate to John if he survived, and did not look to the contingency of John's dying without leaving a

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child after the estate had vested in him on his mother's death.

It is much more reasonable to suppose that if the testator had ever looked beyond the period of the death of his niece, as the time for the complete vesting of the whole estate, he would have made a provision in favor of any other of her children, in event of John's surviving and then dying without leaving a child, than in favor of another nephew. This clause furthermore directs that these other children of Ann should take and enjoy the *same estate* that John would have taken if he had survived his mother. They must have taken the fee absolutely, for it is not pretended that the will contains any limitation over after their deaths. Yet this estate, so to be vested in them on the event designated, is by the testator described as the same estate which John was to take if he survived.

After these various dispositions in favor of his niece and her son John, his and her other children, if any, the testator proceeds to provide for another contingency which he anticipated; that was the possibility of his niece outliving her son John, and neither of them leaving any child or children surviving her, so that there would be no descendant of said Ann in being at the time of her death, to inherit the estate. He therefore provides that if the said Ann and her son John shall both depart this life without leaving children to inherit the estate, in that case, at the death of the said Ann and her son John, the estate is devised to his nephew, Luke Cannon, junior.

The context, I think, shows clearly, that the testator looked alone to the period of Ann's death as the period when the trust should expire and the whole estate pass absolutely. By express words to John, if he survived his mother; or to his children, if he died before her, leaving children; or to her other children, if any, if he

died before her, leaving no children. There is no limitation over after the estate should have vested in John's children on one contingency, or the other children of Ann on another contingency.

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It would be a forced construction to suppose that the testator intended to make a limitation over in favor of the last devisee, which he had omitted to make in favor of the immediate descendants of Ann Sowden. The phrase is elliptical. When he speaks of the said Ann and her son John both departing this life without leaving children, he meant to refer to preceding clauses, which had provided for such an event, and is not to be understood as referring to the death of John at any time after his mother's death, leaving no children. The clause, to effectuate the intention and make the will consistent with itself, should be read as if he had said, "But if the said Ann and her son John should both depart this life *as aforesaid*, without leaving children *as aforesaid* to inherit the estate."

It seems to me that the testator intended, in the event which has happened, of John's surviving his mother, that the whole estate should vest in him absolutely, and the limitation over in favor of Luke Cannon could never thereafter take effect.

I think the judgment should be affirmed.

DANIEL and MONCURE, *Js.* concurred in the opinion of Allen, J.

LEE and SAMUELS, *Js.* dissented.

JUDGMENT AFFIRMED.

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November 23d.

A deed of trust to secure *bona fide* creditors, conveying land, slaves, and crops cut and growing, not to be enforced for two years, reserving the profits in the mean time to the grantor, and directing the surplus proceeds of sale, after payment of the debts secured, to be paid to the grantor, is not fraudulent *per se*, though made without the knowledge of the creditors.

This was a bill by Seaman and others, creditors of Benjamin L. Belt and Humphrey S. Belt, to set aside two deeds executed by these parties, on the ground that they were fraudulent, and intended to hinder and delay their creditors. The trustee answered, denying any knowledge of a fraudulent intent, and the Belts denied all fraud: And the only question in the cause was, whether the deeds were fraudulent on their face. Both the deeds were dated on the 4th day of August 1848, and each conveyed one moiety of the same property; and their provisions were substantially the same. One of them, executed by Benjamin L. Belt, conveyed to Willis J. Dance a moiety of a tract of land in the county of Powhatan, the grantor's interest in three slaves, and in the crops on hand made the then present year, and those then growing. And it provided that Belt should be permitted to remain in possession of the property, and receive the profits thereof, until the 4th of August 1850, unless he should give his written consent to a sale before that time. And after that time the trustee was authorized, upon the request of any one of the preferred creditors, to proceed to sell the property on a credit, as to the land, of one and two years, and the personal property for cash, and apply the proceeds to the payment of the

debts intended to be secured thereby, in the order therein prescribed. The deed of Humphrey S. Belt conveyed the other moiety of the same land, slaves and crops, and also the plantation utensils, to the same trustee, reserving the profits for the same time; and then upon trust, first to pay certain debts of his own, and then other debts for which he was security as endorser for B. L. Belt.

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The trustee did not sign the first of these deeds, though he did the second. Nor were any of the creditors present when they were executed, though some of them afterwards assented to them. At the time the deeds were executed both the Belts were insolvent.

The plaintiffs were provided for in both deeds; in that of B. L. Belt they were in the first class; in that of H. S. Belt, so far as he was bound for their debts, in the second class; but they declined to claim under the deeds, and sued and recovered judgments, which were docketed in the clerk's office of the County court of Powhatan.

The plaintiffs, Seaman and Muir, alleged and proved that B. L. Belt had contracted with them, that if their debts were not paid by a certain time, he would give them a deed of trust upon the goods in his store; and that he failed to do it.

When the cause came on to be heard, the court below held that the deeds were fraudulent as to the creditors, and proceeded to decree in their favor. And the trustee, and the creditors claiming under the deed of H. S. Belt, applied to this court for an appeal, which was allowed.

Steger, for the appellants.

Griswold and *Clairborne*, for the appellees.

ALLEN, P. If the questions presented by the record in this case were of the first impression in this court,

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it would be matter for grave consideration whether deeds of trust, such as those assailed by the bill of the appellees, did not contravene the spirit of the statute against fraudulent conveyances: Whether a deed of trust executed by a debtor on the verge of insolvency, creating preferences amongst his creditors, postponing the time of sale, the possession in the mean time remaining with the grantor, and the profits to be received by him, and executed without the knowledge of or consultation with the creditors, should not be treated as made with a fraudulent intent, because the reservations and conditions may tend to hinder and delay creditors in the prosecution of their legal remedies to enforce the payment of their debts. But these questions have been settled by a series of adjudications in this court. It would disturb many titles if the principles heretofore established, and sanctioned by the practice of the country, were now to be questioned. If inconvenience results from the construction heretofore given to the statute against fraudulent conveyances, the remedy should be administered by the law making power. An act of the legislature would operate prospectively, and men could regulate their transactions so as to conform to its provisions. But a decision of this court, giving a new and different rule of construction, would have a retrospective, and therefore an unjust, operation.

Preference of favored creditors is forbidden by the bankrupt law in England. But where that law does not apply, the right to make such preferences is admitted. In *Estwick v. Caillaud*, 5 T. R. 420, Lord Kenyon says: It is neither illegal or immoral to prefer one set of creditors to another. The same doctrine was avowed in *Nunn v. Wilsmore*, 8 T. R. 521. The same rule has been sanctioned in courts of equity. *Small v. Oudley*, 2 P. Wms. 427. The right results from the ownership of personal property, and the un-

restricted power of alienation. The debtor, if no lien has attached, can sell it or transfer it to any creditor or purchaser, and apply the proceeds to the payment of any creditor he pleases. And if he may do so with the property or its price, there would seem to be no good reason why he should not have the right to cover it by a deed of trust for the same purpose. The right to do so was affirmed in *Brashear v. West*, 7 Peters' R. 608; in *Murray v. Riggs*, 15 John R. 571; and, it is believed, in most of the states.

The cases of *McCullough v. Somerville*, 8 Leigh 415; of *Skipwith v. Cunningham*, Id. 271, and *Phippen v. Durham*, 8 Gratt. 457, have recognized the doctrine in Virginia. The same cases decide that it is not necessary to the validity of such a deed, that the creditors should have been consulted beforehand. In *Skipwith v. Cunningham*, 8 Leigh 271, the subject is examined by Tucker, president, who observes, "that if the grantor seals and acknowledges, and delivers, (though not to the grantor personally or to his agent,) a deed setting forth a bargain and sale for a valuable consideration, that consideration instantly raises a use, which the statute instantly executes, and vests the estate in the bargainee, with or without his assent, leaving him, indeed, the capacity to avoid it at his pleasure, by renouncing it." And "that there is no instance in which the courts of Virginia have decided that such deeds were incomplete and ineffectual, for such a decision would shake every title in the commonwealth." And in the recent case of *Phippen v. Durham*, 8 Gratt. 457, the deed was executed without the knowledge of the creditors, and was not signed by the trustee.

That the reservation of an interest in the property, by postponing the time of sale, or directing a sale on credit, or providing for the payment of the surplus after satisfying the creditors secured, do not, of themselves, furnish evidence of fraudulent intent, has been affirmed by the repeated decisions of this court. *Skip-*

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with *v. Cunningham*, 8 Leigh 271; *Kewan v. Branch*, 1 Gratt. 274; *Lewis v. Caperton's ex'ors*, 8 Gratt. 148; *Cochran v. Paris*, *supra* 348; *Janney v. Barnes*, 11 Leigh 100.

The fact that creditors may be delayed or hindered is not of itself sufficient to vacate such a deed, if there is absence of fraudulent intent. Every conveyance to trustees interposes obstacles in the way of the legal remedies of the creditors, and may, to that extent, be said to hinder and delay them.

Postponing a sale to an unreasonable time may be a circumstance, in connection with other circumstances, tending to prove a fraudulent intent. If made with such an intent, the time to which the sale was postponed would not affect it. Neither the stipulation to postpone the sale or to return the surplus can operate to the exemption of any portion of the debtor's property from the payment of his debts. The surplus is rightfully his property; everything not embraced by the conveyance belongs to him for the benefit of his creditors; is liable for his debts. The mode of subjecting it may be different, but there can be no question of the right of the creditor to do so. A deed of trust for the security of a future or contingent liability, as for the indemnity of a surety or endorser, could not be impeached for that cause alone, if made *bona fide*. Such deeds are of every day's occurrence; and their validity has never been questioned. Such a deed may interpose obstacles to the legal remedies of creditors for an indefinite period of time. But the interest of the debtor would still be subject to his debts, and could be reached, if not by legal process, by a proceeding in chancery; which, in a proper case, would no doubt sequester and apply the rents of the land, the hires of his slaves, and the interest arising from the sale of the perishable estate, to the discharge of his debts.

- The cases of *Spencer v. Ford*, 1 Rob. R. 648, and

Spence v. Bagwell, 6 Gratt. 444, are supposed, by the counsel of the appellees, to modify the doctrine held in other cases, and to establish principles which would show the deeds in this case to be invalid. In the first case there were two deeds of trust, the first not appearing to have been made with the knowledge of, or to have been ratified by, any creditor or trustee named therein, and under which no claim was asserted until the execution of the second deed, and the application of the proceeds thereunder; and then the claim was asserted by a creditor not named in the deed, or known to be a creditor. It was held that such creditor was not entitled to relief against the *cestui que trust* in the last deed. The refusal of relief under such circumstances does not decide that a deed made without consultation with creditors is for that reason fraudulent. Before any right or claim under the first deed was known or asserted the property had been conveyed, and the proceeds applied to a fair creditor, against whom, under the circumstances, there was no just cause of reclamation.

In *Spence v. Bagwell*, 6 Gratt. 444, the deed contained such limitations and conditions as secured to the debtor a full control over the property, and would have enabled him to defeat the conveyance. The deed reserved the right of possession from November 1841 until March 1843; that he should be considered the agent of the trustees, with full power to sell and collect the proceeds; and with a provision that if he paid off the debts, or any part of them, by moneys not raised by the sale of the trust property, he should be considered a creditor of the trust fund, and might retain the amount out of the proceeds arising from a sale of the property conveyed. The deed on its face showed a contrivance to retain as owner first, and as agent, the control of the property, with authority to convert the proceeds of his labor into debts charging it, so as to keep it beyond the reach of his general

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creditors. Neither of these cases impairs the authority of the cases before referred to, and which, it seems to me, are decisive of the case under consideration. The fraudulent intent is denied by the grantors, and there is no proof except that arising from the face of the deed. The court cannot presume the fraud unless the terms of the instrument preclude any other inference. As to the *cestui que trust*, it is not pretended that they participated in any fraud. They were not consulted; and though, if the fraudulent intent clearly appeared on the face of the instrument, they would be affected by it if they claimed under it, the reservations on the face of the deeds do not raise, under the doctrines of this court, an irresistible presumption of fraud, which would of itself vacate the deed.

The violation by B. L. Belt of his engagement of the 17th of May 1848, to give a deed of trust on other property to secure the appellees, Seaman and Muir, can have no bearing on the deeds under consideration. They embrace other property. It does not appear that the other creditors had any notice of the agreement; and the failure of the debtor to give one creditor a deed of trust on specific property does not even tend to prove a fraudulent intent in the execution of another deed, on other property, to secure all his creditors; the creditor in question being one of the class of preferred creditors.

I think the decree was erroneous, and that the same should be reversed, and the bill dismissed with costs.

The other judges concurred in the opinion of *Allen, J.*

DECREE REVERSED.

Richmond.

ROBINSONS *v.* ALLEN & *others.*1854.
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1. A will, appearing upon its face to have been made by a married woman, if it has been regularly admitted to probat in the proper court, its validity cannot be questioned in a collateral suit.
2. Testatrix gives certain property, real and personal, to her husband for his life, with authority to use the same as he pleases in every respect. She then says: "At the death of my husband, or before, if he chooses to relinquish his rights, I give all the land and other property to one or more of the children of R, as he may designate; or authorize, should it be necessary, him to make such other disposition of the same as he may deem proper, having full confidence in him that he will do what is right." R was the daughter of the husband by a former wife. The husband died in the life time of the testatrix. **HELD:**
 1. The provision in favor of the children of R is void for uncertainty.
 2. The testatrix did not dispose of the remainder in the property after the life estate given to the husband; but authorized the husband to dispose of it: And as he died in her life time, the property was not disposed of by her will, but passed to her heirs and next of kin.

This was a suit in the Circuit court of Fauquier county by Susan Allen and others, the heirs at law and next of kin of Catharine Bradford deceased, against William H. Gaines, administrator with the will annexed of Catharine Bradford and Samuel Robinson and others, claiming to be legatees under Mrs. Bradford's will.

Mrs. Bradford died in 1851; and her will was duly admitted to record in the County court of Fauquier. By her will, which bears date the 17th of October 1848, she provides as follows:

"The worldly goods which it hath pleased God to bless me with, I give, devise and dispose of as fol-

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lows: To my husband, Thomas G. Bradford, who has devoted his time and means to my comfort, and given his attention to my business, for many years, that his few remaining days may be comfortable, I give for his life the plantation on which we have resided, and all the land thereto attached, and every species of property on it, not disposed of otherwise by me, with authority to use the same as he pleases in every respect.

"At the death of my husband, or before, if he chooses to relinquish his rights, I give all the land and other property on the premises we now occupy, to one or more of the children of Caroline A. Robinson, as he may designate; or authorize, should it be necessary, him to make such other disposition of the same as he may deem proper, having full confidence in him that he will do what is right."

Caroline A. Robinson was the daughter of Thomas G. Bradford by a former wife. He died in 1850, in the life time of Mrs. Bradford.

The cause came on to be heard in September 1852, when the court below held that the devise in the will of Mrs. Bradford, to one or more of the children of Caroline A. Robinson, was void for uncertainty; and gave a decree in favor of the plaintiffs, as heirs and next of kin of Mrs. Bradford. From this decree the Robinsons applied to this court for an appeal, which was allowed.

Patton, for the appellants.

Morson and *Williams*, for the appellees.

SAMUELS, *J.* This case grows out of a contest for the succession to the estate, real and personal, of Catharine Bradford deceased.

The appellants claim under an alleged will of the decedent, conferring on them, as they insist, the estate in controversy; the appellees claim as heirs at law and next of kin of the decedent.

In a contest of this nature, between such parties, it is incumbent on the parties claiming under a will to establish their claim: for if property be not effectually disposed of by will, it passes to the heirs at law and next of kin, by operation of the statute of descents and the statute of distributions.

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The appellants, to sustain their claim, rely upon a paper, in form a will, exhibited to the County court of Fauquier county, where Catharine Bradford resided up to the time of her death; and by that court admitted to probat as a will. It was suggested, however, by the appellees' counsel, in the argument here, that in as much as it appears on the face of the paper that Catharine Bradford was a married woman at the time of executing it, it cannot have the effect of a will; and that she must be regarded as dead intestate. This objection could have had no force in this suit, even if made in the court below; for it is well settled by the decisions of this court that the sentence of a court of probat, of competent jurisdiction, admitting a will, or writing in nature of a will, to probat, is conclusive evidence of the due making thereof, and that it cannot be denied in any collateral proceeding touching the will: that its validity can be tested only by resorting to the means provided by law for that specific purpose. See *West v. West's ex'or*, 3 Rand. 373; *Vaughan v. Doe ex dem. of Green*, 1 Leigh 287; *Wills v. Spraggins*, 3 Gratt. 555; *Parker's ex'ors v. Brown's ex'ors*, 6 Gratt. 554.

The only remaining question before the court is, whether or not the will gives the estate to the appellants? The sole purpose in the construction of a will is to find out how the maker of it intended to dispose of the property, and to apply the rules of law to such disposition; thus the duty of a court is the same as in all other judicial enquiries, to wit, to ascertain the facts and declare the law thereon. In the

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first branch of this duty, the court must look chiefly to the will itself. Although extrinsic proof is admissible under certain circumstances, for limited purposes, it is enough (for the purposes of this case) to say it is not admissible to explain ambiguities patent on the face of the will. The language of the will itself must be relied on as the chief guide. If that language be ordinary and popular, its meaning is to be construed according to its usual acceptation; if technical, legal terms be used, they are to be construed in the sense which the law affixes. The courts, in their anxiety to seek aid in their investigations, have frequently and usually looked to adjudged cases, although it is said by high authority that they can and do seldom afford assistance in ascertaining the intention in any case. *Shermer v. Shermer's ex'ors*, 1 Wash. 266. The justice of this remark is fully verified by turning to the cases cited in the argument of this case: they are found in conflict with each other; and many of them are made to turn upon distinctions so exceedingly refined, not to say capricious, that they should be regarded as very unsafe guides in seeking for the intention of a plain testatrix, who expressed herself in the ordinary language in popular use. I hold that there is enough plainly expressed on the face of the will before us to leave no doubt of the facts to what extent and to whom the testatrix intended to dispose of the property herself, and to what extent she intended to confide the further disposition of her property to another.

After giving her husband an estate for life in the property, free from restrictions usually thrown around life estates, the will proceeds thus: "At the death of my husband, or before, if he chooses to relinquish his rights, I give all the land and other property on the premises we now occupy, to one or more of the children of Caroline A. Robinson, as he may designate; or authorize, should it be necessary, him to make such

other disposition of the same as he may deem proper, having full confidence in him that he will do what is right."

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The husband died in the life time of his wife, the testatrix; and thus the power of appointment, contemplated by the will, never vested in him, and was never executed. It is insisted by the appellants that the will, of itself, is sufficient to convey the estate to them; that is, to all the children of Caroline A. Robinson.

The testatrix, if she had thought it proper, might herself have given the estate directly to all the children of Mrs. Robinson, or to one or more of them, as she herself might have designated. So, if she thought it proper, she might forego the exercise of her power of disposition, and confer that power on another. There is a substantial and distinctly marked difference between the purpose of disposing of her property herself, and the purpose of authorizing another to make such disposition as he may deem right. If the testatrix had said in terms: "I will not, for my own reasons, dispose of my estate after the life estate I have given to my husband; but I authorize him to dispose of it after his death, to one or more of the children of Caroline A. Robinson; or to make such other disposition of it as he may deem proper," it would clearly be held that the testatrix had not disposed of the remainder after the life estate, at least to those children. The legal effect of the terms used is identical with that of the terms supposed; *expressio unius exclusio est alterius*: Having declared her purpose of authorizing another to make the disposition is equivalent to a declaration that she will not herself make it.

If the testatrix had conferred the estate immediately upon the whole class of Caroline Robinson's children, giving her husband authority to appoint the proper-

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tions in which it should be divided, or giving him authority to designate one or more of the class who should take it, to the exclusion of all others of the class, in the events which have happened, the whole class would take equally. The will before us differs widely from the case supposed; it gives to "one" or "more" of the class; that is, to one or more of a class, six in number. The questions are at once presented, Which "one"? How many "more" than "one"? And which of them? The answer is obvious: Such "one or more" as the husband may designate. I am not prepared to say, as a matter of fact apparent on this will, that the terms *one or more* mean all; or that an attempt to confer a power without limits on another is in itself identical with a definite exercise of that power by the principal. Such would be my construction, if the disposing clause had ended with the word "designate." If, however, any doubt remained, it must be apparent from the next clause that the whole class, or any one or more of them, were not the certain objects of the testatrix's bounty. She in terms authorizes her husband, should it be necessary, to make such other disposition of the estate as he might deem proper; she having confidence in him that he would do what is right.

The appellants' counsel argued here, that this latter clause is to be understood as enlarging and defining the husband's authority about the estate conferred on Mrs. Robinson's children; that it was intended to give him power to make family settlements, or impose changes, as the necessities of the family might require. Such, I conceive, is not the true reading of the clause. It gives authority to dispose directly of the whole subject itself; not merely of a part thereof, or indirectly, by changes or otherwise. In terms, he is authorized to make a disposition of the whole subject, other than that contemplated for a part of the Robin-

son family. The power conferred is coextensive with testatrix's confidence in her husband; which is declared to be full.

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The appellants' counsel argued here, that the will was intended to vest the husband with a power coupled with a trust; and that the execution of the power having been prevented by death, the court should execute the trust. There are cases in which the courts have taken upon themselves the duty of executing trusts which would otherwise be defeated for want of trustees. These, however, are cases in which trusts, either express or implied, did exist. This is not the case here. The argument, to have availed anything, should further have shown that the appellants are the *cestuis que trust*; which it has not done, and could not do.

On the whole case, I am of opinion that the objects, if any, of the testatrix's bounty, so far as the remainder after the life estate is concerned, are so vaguely described that the will is void for ambiguity on its face.

I am further of opinion, that the testatrix had no definite purpose of disposing of that remainder herself, but only intended to confer a power of disposition on her husband.

It is immaterial to consider whether the unrestricted life estate given to the husband, together with his unlimited power of disposition, should be regarded as giving him the absolute title to the estate; he having died in the life time of the testatrix, his interest, whatever it was, lapsed under the law then existing.

I am of opinion to affirm the decree.

ALLEN, MONCURE and LEE, *Js.* concurred in the opinion of *Samuels, J.*

DANIEL, *J.* concurred in affirming the decree.

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1. Under the circumstances, a person who had qualified as administrator of an estate in Mississippi, held to account for his administration in Virginia.
2. An administrator in Mississippi having purchased for the estate land sold for the payment of a debt due to the estate, held, under the circumstances, not bound to keep the land and account for the price; but the land is to be treated as the property of the estate.
3. Under the circumstances, the administrator not responsible for money which became worthless in his hands by the insolvency of the bank.

This was a suit in equity in the Circuit court of Powhatan county, and afterwards removed to the Circuit court of Goochland, instituted by Elizabeth Stratton, the widow, and three others, the infant children of Milner S. Stratton, against Benjamin H. Powell and Henry Gordon, to recover moneys of the estate of Milner S. Stratton, which the plaintiffs alleged Powell had collected in the state of Mississippi.

Powell demurred to the bill on various grounds, and among others, on the ground that the court had no jurisdiction to compel him to account for his administration upon the estate of Milner S. Stratton in Mississippi. He also answered, stating in detail his action in his efforts to collect the debts due to that estate.

On the 16th of October 1839 Henry Gordon and Elizabeth Stratton, the personal representatives of Milner S. Stratton, in Virginia, entered into a contract under seal with Benjamin H. Powell, by which they employed Powell to go to Mississippi for the purpose of collecting certain debts due in that state to their testator's estate. One was a large debt of

about twelve thousand dollars, due from John D. King and Samuel M. Puckett, which was secured by a deed of trust on land and slaves; another was a debt due by account from Richard M. Hobson, for about two thousand three hundred and sixty-five dollars and eighty-one cents; and a third was a certificate of deposit for six hundred dollars of the Brandon Bank.

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Powell went to Mississippi, and arrived in Jackson about the 1st of December 1839; and finding it would be necessary to become the administrator of Milner S. Stratton, he qualified as such about the end of the month of December. He found King, Puckett and Hobson insolvent, though Puckett had a number of slaves in his possession, which he shortly after carried out of the state. These slaves were included in the deed of trust to secure Stratton's debt; and Powell attempted to prevent Puckett's removal of them by an injunction; but the judge to whom he applied for the injunction held that he could only grant it when his court was in session, and before that time the slaves were gone.

In order to enforce the collection of the debt due from King and Puckett, Powell directed the trustees, Richard M. Hobson and William R. Crane, to proceed to sell the land embraced in the deed; which they did accordingly. Powell, having a short time previous to the sale broken his leg, could not be present himself; but believing, as he says in his answer, that it was important to get the land out of the possession of Puckett, and to keep the purchase money out of the possession of Hobson, he authorized Thomas P. Nash to attend the sale and buy in the land for the benefit of the estate of Stratton. Nash did attend and buy the land at the price of four dollars and twelve and a half cents an acre; making the whole purchase money amount to two thousand seven and forty-seven dollars and twenty-five cents: and the trustees, in Powell's

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absence, conveyed the land to him. This item was the principal subject of controversy in this suit; Powell insisting that the land was purchased for the estate, and the other parties insisting that it was a purchase for himself. The evidence shows that the land was sold for greatly more than land equally good had been sold for, and could be purchased for, in the part of country where it lies. The sheriff of the county says that such lands had sold for fifty cents and a dollar per acre; and no one estimates it higher. It seems, too, that there was but one other bidder for the land; and he was the agent of Puckett. It appeared, too, that when Powell heard the land had been conveyed to him personally, he said it was an error, and wished to have it corrected; but was advised by his counsel that it was a matter of no importance. And it was further proved that certainly Dr. Gordon, and probably Mrs. Stratton, had been informed by Powell, upon his return to Virginia from Mississippi, that the land had been purchased for Stratton's estate.

As before stated, Powell found, on getting to Mississippi, that Richard M. Hobson was insolvent. All that he could obtain from him, in satisfaction of his debt to Stratton, was the assignment of a debt due to him from another person, which that other person could only pay in money of the Brandon Bank. This, as he could do no better, he accepted. In his answer he says, the Brandon money so received, and that embraced in the certificate of deposit, never was disposed of by him; and he never could obtain for it specie funds or Virginia money, at any discount, however great. On the 6th of February 1840 he deposited what he so received, as well as six hundred dollars which was before in the bank, making the sum of two thousand six hundred and three dollars and seventy-eight cents, in the Brandon Bank, and took a certificate of the deposit.

It appears that when Powell first arrived in Mississippi, in December 1839, Brandon money was very much depreciated. One of the witnesses for the plaintiffs states that during the first part of the year 1839 it was worth about fifty cents on the dollar, in exchange for other Mississippi money, which was somewhat below par; but they had not a fixed exchangeable value; and by the 1st of May had depreciated to forty cents in the dollar, and continued gradually to depreciate during the summer, and were worth about twenty-five cents about the month of October; about which time judgments to a very large amount, probably to about half a million, were obtained against the bank, and its issues depreciated more rapidly; and on the 1st of January 1840 it was worth from about five to ten cents, having no fixed value, and shortly afterwards became wholly worthless, and had so continued. Two other witnesses for the defendant say that they cannot say that Brandon money was, in the latter part of 1839 and the beginning of 1840, worth any particular amount in specie funds or Virginia money. They did not think it was possible to have purchased with Brandon money more than a few dollars in specie or Virginia money, at any rate of discount. Notwithstanding its enormous depreciation, it continued to be received at its nominal value, to a considerable extent, by collecting officers and others, in ordinary business transactions, until some time in the spring of 1840, when it suddenly commenced to go down, and soon got to be regarded universally as worthless. Many persons continued to receive it up to that time, confiding in the assurances of the managers of the bank, that the return of sales of cotton, which the bank had shipped to Europe, would give it the means of redeeming its paper. And it was proved that in the year 1840 the president of the bank and other directors declared that in the end the bank would be solvent and its notes at par.

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The plaintiffs filed in the cause two letters from Powell to Henry Gordon—the first from Jackson, in Mississippi, dated December 1st, 1839, a few days after he arrived there. In it he says: “Well, this Brandon money: if you have altered your mind about it, write me: it is now worth about twenty-four cents in the dollar. I think there are great doubts whether it will be better or not. Write me your notions on the subject.” The second from the same place, written just after he qualified as administrator on Stratton’s estate, and dated December 27th, 1839. In it he says: “With respect to the Brandon money, I will, on Monday next, take it out of the bank. If I could have had it when I first got to the state, I think I could have sold it for twenty-five or thirty cents in the dollar. Since that the marshal here has levied on thirty thousand dollars of specie that is said to belong to the Brandon Bank; it here laid in the Planters Bank. Since that it has been going down, and the last accounts from New Orleans it was worth only fifteen cents to the dollar. That market governs all money here, and we get mails from there here every three or four days. There was ten thousand dollars offered the other day in Vicksburg for one thousand dollars in Union post notes. I have been expecting a letter from you several mails with advice on the subject. I think now, as I have for the last twelve months, it will get to nothing.”

The fidelity and zeal of Powell in the administration of Stratton’s estate was testified to in the strongest terms; and the record affords abundant evidence that he shrunk from no effort, expense, or personal liability which seemed to hold out a probability of recovering the money due to the estate of Stratton.

The court below held that Powell must keep the land he purchased, and account to the plaintiffs for the amount of the purchase money; and that he must also account for the Brandon money, as well the six hun-

dred dollars which was on deposit in the bank, as that which he received on account of the debt of Hobson ; and he was charged with it at the rate of ten cents on the dollar. The account thus settled made Powell a debtor, on the 31st of December 1844, in the sum of three thousand and forty-six dollars and seventy-one cents, of which two thousand four hundred and twenty-six dollars and thirty-one cents was principal ; and for this sum, after deducting one hundred and fifty dollars for his second trip to Mississippi, which by the agreement aforesaid he was to receive, a decree was made in favor of the plaintiffs, giving to Mrs. Stratton one-third, and dividing the balance among the three children of Milner S. Stratton. From this decree Powell applied to this court for an appeal, which was allowed.

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Stanard & Bouldin and Irving & Johnson, for the appellant.

Patton, for the appellees.

SAMUELS, *J.* It is unnecessary in this case to consider whether a personal representative, holding his appointment under authority of foreign laws, if found in Virginia, can, under all circumstances, be sued here in his official character. There is enough in the peculiar circumstances of this case to give jurisdiction to our courts. The appellant (the defendant below) resided in Virginia at the date of those transactions out of which this litigation arises : those transactions had their origin in this state. The bill alleges a case of fraud and want of proper diligence against the appellant ; and upon that charge they predicate a claim merely personal and pecuniary. The appellant resists this demand, but admits that he is invested with the legal title to certain land lying in the state of Mississippi, and to certain choses in action payable in that state ; the equitable title to all which, on certain

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terms, enures to the benefit of complainants. It is not alleged by the appellant that creditors of Stratton's estate in Mississippi or elsewhere are in anywise concerned in the property in his hands; nor is it alleged by either party in pleading, or shown by proof, that the subject in controversy is affected in any degree by laws peculiar to the state of Mississippi. The case seems to have proceeded upon the theory that it was governed by the general principles prevailing in courts of equity. The appellant being within the jurisdiction of the court, full effect may be given to its decree by the exercise of its authority over his person. Thus the parties who are exclusively interested are before the court; they are at issue whether the appellant is liable to a demand of the appellees merely pecuniary, or whether he shall be held to be a mere trustee for their benefit, on equitable terms. The facts above stated bring the case within the jurisdiction of our courts. This conclusion is fully sustained by the decision of this court recently made in the case of *Dickinson v. Hoomes' adm'r*, 8 Gratt. 353, upon a review of many decisions touching the question.

Passing from the question of jurisdiction to the merits of the case, we are met at the threshold by the fact that such of the debts due Stratton's estate in Mississippi as give rise to this controversy were either in a very precarious condition or utterly insolvent. That due from King and Puckett was partially secured by a deed of trust on the land and slaves. The land was about six hundred and sixty-six acres in quantity; and the witnesses differ as to its value; some of them estimate it at fifty cents per acre; others at prices ranging from fifty cents up to a dollar and fifty cents. The weight of proof, however, induces the belief that it could not have been sold for as much as fifty cents per acre, payable in specie or its equivalent. This land and the slaves conveyed by the deed

of trust were in the hands of Samuel M. Puckett, one of the debtors: This party and John D. King, with whom he was bound, are proved to have been utterly insolvent. It is moreover shown that Puckett removed the slaves beyond the limits of the state of Mississippi, with the fraudulent intent to defeat the trust; and thus the security afforded by the slaves was destroyed. No attempt is made to charge the appellant on account of these slaves; it is therefore unnecessary to say more about them. The land, the only remaining security, was in the hands of Puckett, the fraudulent debtor. The trustees were Richard M. Hobson and William R. Crane; and Hobson is shown to have been insolvent. Such was the security, and such the means of making it available.

Powell having become the administrator on Stratton's estate in Mississippi, caused the trustees to sell the land, and caused it to be bought in for the benefit of the estate at the price of four dollars twelve and a half cents, an acre. That he bought the land with the view of benefiting the estate, and without any purpose of individual profit, is sufficiently shown by the proof. Powell assigns as a reason for buying the land, his anxiety to get it out of the hands of Puckett, and to prevent Hobson, the insolvent trustee, from receiving the price, if it had been sold to another. He alleges, moreover, that the land was run up to the price of four dollars by Puckett's agent, with a view to defraud Stratton's estate by means of collusion with Hobson, the trustee. There is no direct proof of this fraudulent intention; however, considering the exorbitancy of the price of four dollars per acre, we have reason to believe there was no purpose of paying it in good faith.

Powell says nothing about the pecuniary condition of Crane, the other trustee, nor does he say whether, by the law of Mississippi, he would have been respon-

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sible for money paid to his cotrustee, Hobson, or by him covinously released to the purchaser.

In view of the small intrinsic value of the land, and the utter insolvency of the debtors for all beyond that value, and the insolvency of Hobson, the trustee, I am of opinion Powell did the best for the estate which could be done in the difficult circumstances in which he was placed. The land, the only available security, is saved to the estate. This was done at a price nominally far above its value, yet it was paid out of the debt due from King and Puckett, which was of no value; and the estate loses nothing thereby. If Powell, under the circumstances, had in some degree mistaken his duty, yet his great diligence and perfect integrity of purpose should exempt him from liability. The extraordinary embarrassment in the monetary affairs in Mississippi, at the time of Powell's administration there, would seem to require some relaxation of the rules governing the administration of estates there; at least, the administrator should not be held responsible when it appears that the ordinary course of administration would probably, not to say inevitably, have resulted in a greater loss. In this case the administrator acted wisely in buying the land, which would not, as far as we can now judge, have sold to another for more than fifty cents per acre, if so much, payable in a sound medium. I am of opinion the appellant should not be held to a personal liability on account of his purchase of the land.

Another question between the parties is, whether Powell, the appellant, should be charged for his failure to dispose of the debt due from the Brandon Bank? The appellees take no exception on account of the fact that a portion of this debt accrued from receiving it indirectly in payment of a debt due from Richard M. Hobson, above named, to Stratton's estate. They insist, however, that Powell should be charged with

the market value of the Brandon Bank debt, which the commissioner fixes at ten per cent. of the nominal amount. He accordingly charges the appellant one hundred and ninety-six dollars and seventy-seven cents, that sum being ten per cent. on the Brandon Bank notes received on Hobson's debt as aforesaid; and the further sum of sixty-five dollars and twenty-two cents, that being ten per cent. on the principal and interest on the certificate of deposit made by Stratton in his life time in that bank.

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The principle on which this claim is made is in conflict with that on which the claim is made to charge the appellant in regard to the land. It is said, in regard to the land, that he was going beyond his official duty in purchasing; yet it is said he should have sold this Brandon Bank debt, whereas his official duty required the collection and not the sale of it. I am of opinion the appellant acted with prudence at the time in refusing to sell, although subsequent events have shown that if a sale could have been effected on any terms, it had better been made. The proof shows that the credit of the bank had fallen so low, about the date of Powell's qualification, that its paper was selling at a discount, which is variously stated by the witnesses to be from eighty-five to ninety-five per cent.; that it would have been very difficult, if not impossible, to have disposed of a large amount of it for specie even at that discount. The bank has since failed entirely; and thus the debt is of no value. The appellant had been told, or others had been told, by the directors, that the bank would meet its liabilities; having, as they said, the means of doing so. Thus the alternative was presented, of selling, if a sale could be made, at a discount ranging from eighty-five to ninety-five per centum, or awaiting the chance of full payment. The appellant decided properly under the circumstances existing at the time;

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and he should not be made to suffer because of subsequent events. If the circumstances could be reversed, that is, if the sale had been effected at the discount, and if the bank had become able to pay its debts, he would justly have been held responsible for the loss.

On the whole case, I am of opinion the appellees have shown no right to charge the appellant with any amount on account of the specific charges alleged. His diligence, discretion and perfectly good faith give him a claim to the protection of a court of equity.

The land in the hands of Powell, and any rents and profits received by him, and the Brandon Bank debt, should be regarded as trust subjects, to be administered under the direction of the court, in the manner pointed out by the decree of this court.

The other judges concurred in the opinion of SAMUELS, *J.*

The decree was as follows:

The court is of opinion, that the said decree is erroneous. It is therefore adjudged, ordered and decreed that the same be reversed and annulled; and that the appellant recover of the appellee, Ann Elizabeth Stratton, sometimes called Elizabeth Stratton, and William E. Royall, the next friend of the infant appellees, the costs of the appellant expended in the prosecution of his appeal here. And the court proceeding to render such decree as the Circuit court should have rendered, it is further decreed and ordered, that Benjamin H. Powell be held and treated as a trustee, holding the land in the proceedings mentioned, and any rents and profits thereof by him received, and the debt due from the Brandon Bank, as a trust subject, to be administered under the direction of the Circuit court. With the purpose of ascertaining the proper application of any funds arising from said

subject, it is further decreed and ordered, that an account be stated between Benjamin H. Powell and the estate of Milner S. Stratton deceased, in which account said Powell shall be permitted to debit the estate with all reasonable disbursements made by him in Mississippi, with the view to protect the interests of the estate there; also with any money paid over to the executor or executrix in Virginia; also with the sum of one hundred and fifty dollars, as a compensation for his second trip to Mississippi; also with a reasonable commission on money due the estate and received by said Powell. In the said account the estate is to have credit for any money received by said Powell as administrator, and for the avails of the trust subject, which are to be paid to Powell, after deducting the costs of executing the trust. Upon the account so to be taken, if the appellant shall be in debt to the estate, the several legatees of Milner S. Stratton, deceased, may have decrees for the balance, ratably, in proportion to the amounts of their legacies. If, however, the administrator shall be in advance with the estate, the court does not deem it proper to give him a decree against the assets in Virginia.

The cause is remanded, to be proceeded in according to the principles herein declared.

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1. A member of the Society of Friends, by his will, gives a legacy of a remainder, after a life interest, to his niece M, "during her single life, and forever, if her conduct should be orderly, and she remain a member of the Society of Friends" When M arrived at a marriageable age there were but five or six unmarried men of the society in the neighborhood in which she lived: And during the life estate she married a man not a member of the Society of Friends, and by that act she ceased to be a member of the society. **HELD:**
 1. The condition is an unreasonable restraint upon marriage, and is void.
 2. There being no bequest over, and no specific direction that upon breach of the condition the legacy shall fall into the residuum of the estate, the condition is therefore *in terrorem* merely, and does not avoid the bequest.
2. On a bequest of a legacy upon a condition requiring any religious qualification, the condition is against the policy of the law of Virginia, and therefore void.
3. **QUERE:** If the condition be a condition precedent, the legatee can take the legacy free from the condition, or if the legacy lapses: And it seems that the legatee will take a legacy of personal property, though a devise of land would fail.

This was a suit in equity in the Circuit court of Hanover county, by Wilson Maddox and Martha Jane Maddox against William G. Maddox, as administrator *de bonis non* with the will annexed of John Maddox, and others, claiming as residuary legatees of John Maddox deceased. The plaintiffs claimed that the defendants, who were also legatees of John Maddox, had forfeited their interest in his estate by violating the condition upon which the legacies were given. The facts are stated by Judge Lee in his opinion. The decree below was in favor of the defendants. Where-

upon the plaintiffs applied to this court for an appeal, which was allowed.

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Lyons, for the appellants.

Griswold and *Claiborne*, for the appellees.

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LEE, J. The testator, who was a member of the Society of Friends, departed this life in the year 1834. By a codicil to his will, dated on the 7th of June 1834, after certain specific bequests, he directs the proceeds of his estate, which was to be converted into money, to be divided into three equal parts, and to be disposed of as follows: One third for the benefit of his father during his natural life; one other third to be applied to the payment of a bond due his brother, Thomas Maddox, or whatever sum might be due upon such bond; and the interest of the remaining third to go to his brother, William G. Maddox, during his natural life. At the death of his father, the third set apart for him to be returned to his estate, and disposed of according to his will. At the death of his brother William, the third "loaned" to him to be given to his daughter, Ann Maria Maddox, "during her single life, and forever, if her conduct should be orderly, and she remain a member of Friends Society." The codicil concluded with the following clause: "Furthermore, at the closing of all the above things, I wish to give and bequeath all the remaining part of my estate to my nearest relations that may be then living, and that shall be at that time members of the Society of Friends."

After the death of the testator, and during the life time of her father, Ann Maria Maddox married the appellee, Thomas Tiller, who was not a member of the Society of Friends, and thereby, according to the rules and discipline of the society, forfeited her right to membership. The appellee, William Garland Maddox, also left the society, but the time at which he did so is nowhere disclosed by the record.

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As Mrs. Tiller is claiming the benefit of the bequest in remainder to her after the death of her father, and as both she and Garland Maddox are claiming, as two of the next of kin of the testator, to participate in the residuum, we are called upon, in this state of the case, to pass on the validity and effect of the two bequests in this codicil.

As by the rules of the Society of Friends a member who married out of the society thereby forfeited his membership, the effect of the bequest of the third in remainder to Ann Maria Maddox was to restrict her to marriage with a member of the society. Upon her marriage the estate given to her "during her single life" would, according to the terms of the codicil, be determined; and if she married a person who was not a member of the society, she herself ceased to be a member, and was thus excluded from further enjoyment of the estate. The question, then, as it respects the bequest of the third in remainder to Ann Maria Maddox, is as to the validity of such a restraint upon marriage under the circumstances disclosed in this case.

It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged. The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation and development of their character and principles. Hence, not only should all positive prohibitions of marriage be rendered nugatory, but all unjust and improper restric-

tions upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed. Accordingly, in the civil law all conditions annexed to gifts and legacies which went to restrain marriages generally were deemed inconsistent with public policy, and held void. Poth. Pand., lib. 35, title 1, n. 35; Dig. xxxv, tit. 1, l. 22, 64, 72. This doctrine has been introduced into the English law with certain modifications, suggested by a disposition to preserve to parents a just control and influence with their children, and the means of protecting youthful persons against the sad consequences of hasty, unsuitable, or ill assorted marriages. Conditions, therefore, in restraint of marriage, annexed to gifts and legacies, are allowed when they are reasonable in themselves, and do not unduly restrict a just and proper freedom of choice. But where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and domestic life. Hence, such a condition will be held utterly void. 1 Fonbl. Eq., lib. 1, ch. 4, § 10, n. q, 255; Godolph. on Leg., part 1, ch. 15, § 1, p. 45; *Harvey v. Aston*, 1 Atk. R. 361; *Scott v. Tyler*, 2 Bro. C. C. 431, 487; S. C. 2 Dick. 712, 721; 2 Lomax Ex. 80; *Keily v. Monck*, 3 Ridgw. Parl. R. 205; *Hoopes v. Dundas*, 10 Penn. R. 75; 1 Eq. Cas. Ab. 110; *Rishton v. Cobb*, 9 Sim. R. 615, 16 Eng. Ch. R. 616; 2 White and Tudor's Lead. Cas. in Eq., part 1., p. 280, n.

In *Elizabeth Castle's Case*, Law Jurist, December 1846, the vice chancellor declared, in general terms, that "limitations in restriction of marriage were objectionable": and in *Long v. Dennis*, 4 Burr. R. 2052, Lord Mansfield said, "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness. They are contrary to sound policy." And accordingly, even in those cases in which

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restraint of a partial character may be imposed on marriage, as in respect of time, place, or person, they must be such only as are just, fair and reasonable. Where they are of so rigid a character, or made so dependent on peculiar circumstances, as to operate a virtual though not a positive restraint on marriage, or unreasonably restrict the party in the choice of marriage, they will be ineffectual and utterly disregarded. Thus, a condition in restraint of marriage, excluding men of a particular profession, has been held void. 1 Equ. Ca. Ab. 100. So a contract not to marry within six years is void, because it tends to discourage marriage. *Hartley v. Rice*, 10 East's R. 22. So a covenant with a woman not to marry any other person has been held not to be binding. *Lowe v. Peers*, 4 Burr. R. 2225. So a condition annexed to a legacy to a daughter, forbidding her to marry any man who had not a clear unincumbered estate in fee or freehold perpetual, of the yearly value of five hundred pounds, was declared by the lord chancellor to be worthy of condemnation in every court of justice; and it was held void, as leading to a probable prohibition of marriage. And Judge Story lays it down, that restraints in respect of time, place, or person, may be so framed as to operate a virtual prohibition upon marriage, or at least upon its most important and valuable objects; and he illustrates by a condition that a child should not marry till fifty years of age; or should not marry any person inhabiting in the same town, county, or state; or should not marry any person that was a clergyman, a physician, or a lawyer, or any person except of a particular trade or employment; all of which, he tells us, would be deemed mere evasions of the law. 1 Story's Eq. Jur., § 283. In these he seems to be borne out by the opinion of Lord Chancellor Clare, in *Keily v. Monck*, *ubi supra*.

Following these principles and the cases I have

cited for my guide, and looking to the facts in proof in the cause, I cannot avoid coming to the conclusion, that the condition imposed by the bequest of the third in remainder to Ann Maria Maddox, which in effect forbade her to marry any other than a member of the Society of Friends, was an undue and unreasonable restraint upon the choice of marriage, and ought to be disregarded. It is in proof that when she became marriageable the number of Quakers in the county of Hanover, in which she resided, and the vicinity, was small, and that it had been since diminishing. There were not within the circle of her association more than five or six marriageable male members of the society, according to one of the witnesses, or three or four, according to another; and the probability is, as stated by one of the witnesses, the restriction imposed by the condition would have operated a virtual prohibition of her marrying. To say there were members of the society residing in other counties, is no answer to the objection. She certainly could not be expected, if she had the means, which it seems she had not, to go abroad in search of a helpmate; and to subject her to the doubtful chance of being sought in marriage by a stranger would operate a restraint upon it far more stringent than those which are repudiated in the cases and illustrations which I have already cited.

The case of *Haughton v. Haughton*, 1 Molloy 612, 12 Cond. Eng. Ch. R. 295, has been cited in support of the restriction in this case. But that case and the case of *Perrin v. Lyon*, 9 East's R. 170, where the condition was not to marry a Scotchman, which is relied on by the lord chancellor as decisive, were cases of devises of realty; and there is a well settled distinction between them and bequests of personalty, such as is the present case. The former are governed by the rules of the common law, and the rules of the ecclesiastical courts, which control bequests of personalty,

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are regarded as inapplicable. 2 Pow. on Dev. 282; 1 Jarm. on Wills 836; *Harvey v. Aston*, 1 Atk. R. 361; *Reynish v. Martin*, 3 Atk. R. 330; *Stackpole v. Beaumont*, 3 Ves. R. 89; 1 Fonbl. Eq., ch. iv, § 10, n. q. p. 258. Moreover, it may well be questioned how far a decision upon such a question in a country already overstocked with inhabitants is applicable to a country like ours, with an unbounded extent of territory, a large portion of which is yet unsettled, and in which increase of population is one of the main elements of national prosperity. No where can the policy of repudiating all unnecessary restraints upon freedom of choice in marriage apply with more force than among a free people, with institutions like ours, and in the circumstances by which we are surrounded. For this reason, and for another that will be presently adverted to, I should not feel disposed to follow the decision referred to, if it were even more strictly applicable to this case.

But treating the condition annexed to the bequest in remainder to Ann Maria Maddox as a partial restraint upon marriage, by requiring her to marry (if she married at all) a member of the society, on pain of forfeiting her membership and the benefit of the bequest if she married one who was not, there is another and distinct ground upon which it will be disregarded. There is no bequest over of the third thus given to her in case of her breach of the condition; and the condition, therefore, will be treated as *in terrorem* merely, and the legacy becomes pure and absolute. 1 Roper Leg., ch. 13, § 1, p. 654; *Garret v. Pritty*, 2 Vern. R. 293; *Wheeler v. Bingham*, 3 Atk. R. 364; *Lloyd v. Branton*, 3 Meriv. R. 108, 117. Nor will the residuary clause be regarded as equivalent to a bequest over. To render the condition effectual, there must be an express bequest over on breach of the condition, or a special direction that the forfeited legacy shall fall

into the residuum. 1 Jarm. on Wills 841; *Scott v. Tyler*, 2 Dick. R. 723; *Wheeler v. Bingham*, 3 Atk. R. 364; *Keily v. Monck*, 3 Ridgw. P. C. 205, 252; *Lloyd v. Branton*, 3 Meriv. R. 108; *McIlvaine v. Gethen*, 3 Whart. R. 584.

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There is yet another view, which is also equally applicable to the bequest of the residuum, in which the restriction imposed on the bequest of the third in remainder to Ann Maria Maddox should be held to be void and ineffectual. And the case must be considered in this aspect, because upon the results to which we are brought upon such consideration must depend the claim both of Mrs. Tiller and Garland Maddox to participate in the residuum. It is insisted by the counsel, it is true, that there is no proof of disorderly conduct on the part of Mrs. Tiller, nor that she has ever been actually disowned as a member; or, if she have been, that she might still be reinstated; and as she has applied for and done all in her power to gain such readmission, but has been refused by the society, whose action she could not control, she should be regarded as having complied with the condition prescribed, *cy pres*, and should now be exempt from the disability which it creates. And as to Garland Maddox, it is urged that there is no proof he is not a member, and, as he once was a member, it should be presumed that he still remains such until proof be given to the contrary. But the pretensions of these parties cannot be sustained on these grounds. Mrs. Tiller's conduct was disorderly, in the sense intended by the testator, in marrying one who was not a member of the society, contrary to its rules and discipline. In their answer, she and her husband say distinctly that she had left the society; and the fact of her applying for reinstatement sufficiently implies that she had been disowned and excluded. Her application for readmission, however, was not successful, but was rejected.

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because the "Monthly Meeting" distrusted the motives by which it was prompted. She is not, therefore, and has not been a member of the society since she was disowned upon her marriage, which took place some time, probably several years, before the death of her father. And as to Garland Maddox, the bill charges that he was not a member of the society, and on that account was not entitled to participate in the residuum under the clause of the codicil by which it is disposed of. Garland Maddox, in his answer, does not pretend that he is a member, nor does he make any claim to participate as such. He rests his claim upon the ground that he is one of the next of kin, and that the restriction of the benefits of the bequest to such of them only as should be members of the "Society of Friends," a body unknown to the law, is illegal and void. And he *swears* to his answer in the usual mode, instead of making a solemn affirmation, which it is understood is the universal usage with the members of the Society of Friends.

It will not be denied that one of the most marked and distinctive features of our civil institutions is the perfect, absolute and unqualified freedom of opinion in matters of religion which they secure to all who dwell under them. Unjust encroachment upon the rights of conscience, in no inconsiderable degree, gave impulse to the early immigration from the European continent to this, in the hope that upon this new and virgin soil might be enjoyed that full and unquestioned freedom of opinion in matters of religion which was deemed a part of the natural rights of man, but which was denied to him in the old world. It was the spirit of resistance to such encroachment which filled the sails of the *Mayflower*, and wafted her, with the Pilgrim Fathers upon her decks, to their landing on Plymouth Rock. It was the same spirit which brought Huguenots to Virginia and to South Carolina, Catho-

lies to Maryland, Quakers to Pennsylvania, and Presbyterians to several of the colonies. Hence, nothing was more natural or more certain than that when the separation took place from the British crown, and the state of colonial dependence was replaced by a separate and independent government, the rights of conscience and freedom of opinion in matters of religion should have a prominent and well assured place in the new institutions. Thus we see the sixth article of the constitution of the United States provides that no religious test shall ever be required as a qualification to any office or public trust under the United States. And the first article of the amendments to the constitution declares, that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. So the sixteenth section of the bill of rights of Virginia, passed unanimously in convention on the 12th of June 1776, adopted by the convention of 1829-30, and again by that of 1850-51, declares "that religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other." And again: By the act for establishing religious freedom, passed in 1785, the natural rights of mankind upon this subject are set forth and asserted to their fullest extent, and in their widest comprehension, and provision made to hold them sacred, and to give to them their fullest effect. Again: By the amended constitution of 1830, article 3, § 11, and also by that of 1851, article 4, § 15, it is declared that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall any man be enforced, restrained, molested,

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or burthened, in his body or goods, or otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise affect, diminish, or enlarge their civil capacities. And the general assembly shall not prescribe any religious test whatsoever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society or the people of any district within this commonwealth to levy on themselves or others any tax for the erection or repair of any house for public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor and to make for his support such private contract as he shall please." And to guard the legislation of the state against any clerical or sectarian influence, by both of these constitutions, all ministers of the gospel and priests of any religious denomination are declared to be incapable of being elected members of either house of assembly. Constitution 1830, article 3, § 7; constitution 1851, article 4, § 7. Other provisions of our law might be cited, all showing the studied purpose on the part of our law givers to guard carefully the rights of conscience, and to hold them sacred and inviolate.

I take it, then, that upon no subject is the policy of our law more firmly settled, or more plain, clear and unmistakable than upon this, and that all contracts, and all conditions to the same or to gifts or legacies, the effect of which is to thwart and violate this policy, should be held to be utterly void and ineffectual. And I regard a restriction imposed by the terms of a bequest, requiring, as the condition of its enjoyment, that the legatee should be a member of any religious sect or denomination, as directly violative of this policy, and pregnant with evil consequences. It holds out a

premium to fraud, meanness and hypocrisy; it tends to corrupt the pure principles of religion, by holding out a bribe for external profession and conformity to a particular sect; and, however pure and honest the motives of the beneficiary may be, he is yet rendered an object of distrust and suspicion; and we see in this case that although no other "disorderly" conduct than marrying out of the society was imputed to Mrs. Tiller, yet her application to be reinstated was rejected, because, in consequence of the condition annexed to the bequest in her favor, the meeting took up the impression that it was prompted by unworthy and mercenary motives; it hampers the conscience, holds out inducements to stifle its voice and to resist the force of reason and honest conviction; it tends to destroy true religion, and to replace it with what is false and counterfeit; and, in short, it tends to promote all or most of the evils so forcibly denounced in the preamble to the act already cited. See the opinion of Lord Eldon upon a similar subject, in *Kircudbright v. Kircudbright*, 8 Ves. R. 51.

In England, as we know, the established church constitutes an element, and a material element, in the government; and different ideas and a different sentiment prevail. With these the judges in that country must necessarily be deeply imbued. Of this we have an illustration in the case of *Haughton v. Haughton*. The lord chancellor thought the restriction good, but had some hesitation about it, which induced him to offer to send the case to a court of law on the point. The doubt was not whether the condition did not impose an unreasonable restraint or an improper restriction upon freedom of choice in marriage, but whether it was not void because it in effect forbade marriage with a member of the established church. And if there be other cases which, like that just referred to, appear to favor the validity of such a restriction, I do

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not feel disposed to follow them as authority; and however it may be in England, I think such restriction here is contrary to the genius of our institutions, to the spirit of our government, and to the policy of our laws, and, as such, is utterly nugatory, and should be held for naught.

It may be said, however, that as the restriction in the residuary clause is in the nature of a condition precedent, no estate can vest, if it be not complied with, whether it be valid or void. This is undoubtedly true in reference to devises of real estate with a precedent condition in restraint of marriage; for though void, yet if it be not complied with, no estate arises in the devisee. If it be a legacy of personal estate, however, under like circumstances, the legacy will be held good and absolute, as if no condition whatsoever had been annexed to it. 1 Story's Eq. Jur., § 289. And there would be every reason for applying the same doctrine to a restriction like that in this case. But the question is wholly immaterial here; because, if the restriction be held void, it is of no consequence whether the bequest fail or take effect, for either way the residuum goes to precisely the same parties and in the same proportions, the only difference being that in the one case they take as distributees, in the other as legatees.

There are other difficulties attending the restriction annexed to this residuary clause, which render it questionable, if it do not involve so much of ambiguity and uncertainty as to the subject and the time of distribution, and the objects of the gift, as may render it void for that cause. If, indeed, we may discard the idea of time in construing the expressions, "at the closing of all the above things," "that may be then living, and that shall be at that time members of the Society of Friends," and, yielding to the disposition in favor of vesting estates, can refer the time at which

the gift is to take effect to the death of the testator, then no difficulty could occur: for at that time Mrs. Tiller was still a member of the Friends Society; and, in the absence of proof, we might also infer that Garland Maddox was also still a member: and so no question could arise. But I think this cannot be done, because the testator seems plainly to have contemplated some period after his death at which the bequest was to take effect. What, then, was the period intended by him? The balance of the third not needed to pay the debt to Thomas Maddox might be ready for distribution many years before the third given to the father for life would fall in upon his death. Would the former be distributed when it was ready, or would it be held up till the death of the father, and one distribution be made of the whole at that time? If the former, and the third given to the father for life were to be the subject of a separate division upon his death, then a different class might come in at the first division from those who would be entitled at the second; because some of those embraced by the bounty, who were members of the society when the first division should take place, might cease to be so before the period arrived for the second. If one distribution of the whole is to be made, then the part remaining of the third, after paying the debt to Thomas Maddox, must be held up till the death of the father, that it may be ascertained which of the next of kin were members of the society at that time.

And how is the court to determine the question of membership? Religious societies, we know, are subject to schisms, leading to a complete separation, and the formation of new and distinct societies. They have occurred in the Society of Friends. A schism in the society in England in 1801, which led to the formation of a new society called New Lights by the old society. So stated in *Haughton v. Haughton, ubi sup.*

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In this country a separation took place some years since, between those who were called Hicksites, after the mover of the secession, Elias Hicks, and those who called themselves the Orthodox Quakers. Both societies claimed to be the true orthodox sect, and each repudiated the claims of the other. If the court were called on in case of such a division to say which was the true orthodox society, how would it determine between the conflicting claimants?

I shall not enter upon these enquiries, because, for the reasons I have already given, I think the Circuit court did right in treating the restrictions in the codicil as inoperative and void: and I am therefore of opinion to affirm the decree.

The other judges concurred in the opinion of *Lee, J.*

DECREE AFFIRMED.

Lewisburg.

COMMONWEALTH v. HEAD.

August 30th.

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An indictment for selling by retail, without a license, ardent spirits, to be drunk where sold, must set out the place in the county where the sale is made. It is not sufficient to state the sale in the county.

The grand jury for the county of Scott, at the April term 1851 of the Circuit court for that county, indicted Anthony Head, of said county, for that he did, on the 26th of April of that year, at the county aforesaid, sell by retail rum, brandy, &c., without having a license to authorize him to do so, to be then drunk where sold, contrary to the act of assembly, &c.

Head appeared and demurred to the indictment; and the Circuit court sustained the demurrer, and gave a judgment for the defendant. Whereupon, upon the application of the Attorney General, this court granted a writ of error.

The Attorney General, for the commonwealth.

There was no counsel for the appellee.

SAMUELS, *J.* An indictment or presentment should always allege the offence with so much fullness and precision of description that the defendant may know for what he is prosecuted, and thereby be enabled to prepare his defence; and further, that the conviction or acquittal may be pleaded in bar of any future prosecution for the same offence.

If we try the presentment before us by this standard, it will be found defective. The grand jury intended to present an offence against the latter clause

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of the statute, ch. 38, § 18, p. 209 of the Code. This offence is local in its nature; place is of its essence, and yet no place is alleged but the whole county. A sale of ardent spirits by an unlicensed dealer, not to be drunk at the place of sale, would fall within the first clause of the section above cited. The identity of the place at which the spirits were be drunk with the place at which they were sold enters into and forms part of the offence under the latter clause of the statute. If this be so, the defendant should be apprised of the place alleged, so that he may prepared with proof, if any he have, to show that the place of sale and that of drinking are not the same.

The lawful traffic in ardent spirits is had under a license for the purpose, designating a place; the offence of unlawful traffic is committed by a sale at a place without license to sell at such place. A presentment for such unlawful traffic should, on familiar principles, set out the offence with such certainty as to give notice of the offence charged, and to distinguish it from other offences of the same or kindred nature. This is the right of the defendant: he may have defences which he can make to the specific offence alleged, only by knowing what that offence is in all its essential parts. He may be licensed to sell at one place within the county; and, relying on his license, and the consciousness of having sold at no other place, would go confidently into trial; yet upon the trial, under the general charge of selling in the county, proof may be offered to show a sale at any place within the county. This proof the defendant could not anticipate; yet if he had known it, he might have prepared himself to repel it by testimony.

It may readily be alleged, in every case, at what place the sale was made; and this allegation may be most material to the rights of the defendant. No case

can be found among the many decisions of the General court on the subject, in which such allegation was held immaterial. I see no reason to depart from the forms heretofore approved and acted on, and am of opinion to affirm the judgment.

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The other judges concurred in the opinion of *Samuels, J.*

JUDGMENT AFFIRMED.

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POWELL v. THE COMMONWEALTH.

November 14th.

1. QUERE : If the act, Code, ch. 181, § 5, p. 681, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony.
2. The amendments authorized by the act are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial, or evidence *aliunde* : And the amendments authorized are amendments to support the judgment, not amendments to give ground for reversing it.
3. The words "to the prejudice of another's right," in the Code, ch. 193, § 5, p. 733, in relation to forgeries, are descriptive not of the offence, but of the writings of which forgery may be committed; and it is not therefore necessary that they should be inserted in the indictment in describing the offence charged.
4. The maker of a negotiable instrument passes it to the payee, with the name of a third person endorsed upon it, which name he forged : The forging of the name endorsed upon the paper constitutes the offence of forgery.
5. The description of the writing in the indictment, as the endorsement of the person whose name is forged, will not vitiate the indictment, though the simulated liability might not be that of technical endorser, but of a different character.

William A. Powell was indicted for forgery, and for uttering a forged paper, in the Circuit court of the city of Richmond. The indictment charged that Powell, having in his possession a certain writing, which was set out, and is in form a negotiable instrument, made by himself and payable to Roach & McGuire, did feloniously forge on the back thereof the endorsement of the name of the firm of John & George Gibson, with intent to defraud. But the indictment did not charge that it was to the prejudice of another's right. There was another count charging him with uttering the forged paper, in all other respects like the first.

On the trial the prisoner was found guilty, and the jury fixed the term of his imprisonment in the penitentiary at two years. He thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence: But the court overruled the motion; and he excepted, and spread the facts upon the record.

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It appeared in proof that the prisoner purchased a bill of goods of Roach & McGuire, and gave them in payment a negotiable note signed with his own name, and made payable to them or their order, with the name of John & George Gibson endorsed on the back thereof; and that the endorsement was a forgery.

After the end of the term of the court at which the prisoner was convicted, he applied to the judge in vacation to amend the record; and the judge made an order directing that the record should be amended so as to show that, upon the arraignment of the prisoner for the offence aforesaid, he, by his counsel, moved the court to quash the indictment and each count thereof, which motion was overruled, but was omitted to be entered on the record.

Upon the application of the prisoner this court granted him a writ of error to the judgment.

August, for the prisoner.

The Attorney General, for the commonwealth.

LEE, J. Waiving the question whether the provision in the Code, ch. 181, § 5, p. 681, authorizing amendments in judgments or decrees of a court in certain cases by the judge in vacation, after the adjournment of the term, can apply to a case of felony, in which all the proceedings should regularly be had in presence of the accused, or to any criminal case, I am yet of opinion that no such amendment of the record as that attempted to be made in this case, by

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the action of the judge in vacation, on the 11th of May 1854, is within the scope of that provision. It was intended to authorize amendments in support of a judgment, in cases in which there was something in the record by which they could safely be made. It could not have been intended to authorize an amendment to be made upon the individual recollection of the judge, or upon proofs *aliunde*. Nor was the application in this case to *amend* the judgment, nor was it designed to aid the judgment when made. It was an application to introduce something into the record, as part thereof, not before found therein, depending on the recollection of the judge, or upon proofs to be submitted to him; and its object was to provide a means of reversing the judgment, not of sustaining it.

The construction given by the English courts to the statutes of amendment required that there should be something to amend by. Tidd's Prac. 246, 247; *Commonwealth v. Winstons*, 5 Rand. 546, opinion of Judge Green. And such is, I think, the plain meaning of the provision in question in our statute. And if no amendment can be made in the record of a judgment after the term, except under the statute, or in the few cases allowed by the common law, of which this is not one, the amendment attempted to be made in this case must be disregarded; and no objection to the indictment can now be considered, if the offence be charged therein with sufficient certainty for judgment to be given thereon according to the very right of the case. Code, p. 770, § 12.

But it is urged that the omission of the averment, "to the prejudice of another's right," is a defect so material that it may be taken advantage of after verdict; and that it cannot be aided by what is found charged in the indictment. It is said that these terms import a part of the description of the offence de-

nounced in the statute; and that according to well settled rules of pleading they cannot be omitted. I think these words are not intended to be descriptive of the offence, but of the writings of which forgery may be committed. The first and third sections of the act specify various writings by name or general description, the forgery of which is made felony; and the fifth section makes the forgery of any writing, other than those mentioned in the first and third sections, "to the prejudice of another's right," in like manner felony: thus discriminating between those writings which might affect the rights of others whereof forgery might be committed, and other writings, by which, whether false or genuine, the pecuniary interests of others could not be affected. This discrimination has not been introduced, but only preserved, by the statute; being found to exist at the common law, which predicates the offence of forgery only of such writings as are to the prejudice of another's right, or, as it is sometimes expressed, by which another may be defrauded. 3 Chitty Cr. L. 1021; 2 Russ. on Crimes 318. That these words, "to the prejudice of another's right," refer to the writings contemplated by the statute, and not to the act of the party, is, I think, sufficiently established by *Hendrick's Case*, 5 Leigh 707, and *Murry's Case*, Ibid. 720; in neither of which did the indictment contain that particular expression, though it is found in the act of 1819, on which those prosecutions were founded.

But although the employment of these terms is not indispensable in an indictment under the fifth section, it must sufficiently appear, from the description given of the writing alleged to have been forged, that it was writing to the prejudice of another's right. If it be not such, it is not within the statute, and the forgery

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of it cannot be punished as felony. It is insisted that the writing described in the indictment is not embraced by the statute. It is argued that, to be such, the instrument must appear on its face to be valid and effectual to answer the purpose intended, and calculated by its appearance of genuineness to defraud; and that as the plaintiff was the maker of the note, and Roach & McGuire, the payees, the endorsement of the names of John & George Gibson, if genuine, could only have been intended to bind them as second endorsers, and created no liability on their part to Roach & McGuire, the payees; and as parties must be held to know the law, that Roach & McGuire were bound to take notice of this, and so could not be defrauded.

If this proposition be correct as stated, it might perhaps be a sufficient answer to it to say that where a third party puts his name on the back of a negotiable note made by a first to a second party as payee, while still in the hands of the maker, it may be inferred, from the fact of his so doing, that he intended to give the maker credit; and this inference is not to be repelled because his liability as endorser cannot be made operative in favor of a subsequent holder, without first obtaining the name of the payee to the paper: and if the payee, after taking the note, were to endorse his name upon it and put it in circulation, a subsequent holder for value, who should take it on faith of the genuineness of the names so endorsed, would then be defrauded. And the general intent to defraud charged in the indictment would apply to a subsequent holder who might thus be defrauded, as well as to Roach & McGuire; for a party who, under such circumstances, forges the name of an endorser upon a note made by himself, payable to another, and passes it to the payee for value, may pro-

perly be held to have intended to defraud any one who might be defrauded in consequence of his act.

But I do not concur in the proposition as stated by the counsel. It does not follow, because a party stands in the position of first endorser upon a note, that he can never hold a second or subsequent endorser responsible to him. The circumstances may be such that he may well recover against a subsequent endorser. This is conceded by Judge Spencer in *Herrick v. Carman*, 12 John. R. 159, cited by the counsel, and appliedly admitted by Lord Kenyon in *Bishop v. Hayward*, 4 T. R. 470.

The cases which have been decided in the courts of this country, involving the liability of an endorser in blank of a note to which he is no party, are numerous, and perhaps not without serious conflict. Where the note is not negotiable, they would seem to maintain, with little diversity, that such an endorsement in blank, made at the time of the note, will make the endorser liable as an original promiser or maker of the note; and the payee may write a promise to pay the amount of the note, expressing it to be for value received, over the blank signature. *Josselyn v. Ames*, 3, Mass. R. 274; *Moies v. Bird*, 11 Mass. R. 436; *Doan v. Hall*, 17 Wend. R. 214; *Nelson v. Dubois*, 13 John. R. 175; *Herrick v. Carman*, 12 John. R. 159; *Campbell v. Butler*, 14 John. R. 349; *Hall v. Newcomb*, 3 Hill's N. Y. R. 233; *Sylvester v. Downer*, 20 Verm. R. 355. Where the note is a negotiable instrument, however, a distinction has been taken in some of the cases; and it has been held that a party endorsing a note in blank, to which he is no party, cannot be treated either as an original maker or as a guarantor, but, in the absence of controlling proofs to the contrary, must be regarded as having intended to bind himself only as a second endorser. *Herrick v. Car-*

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man, 12 John. R. 159; *Seabury v. Hungerford*, 2 Hill's N. Y. R. 80; *Hough v. Gray*, 19 Wend. R. 202; *Spies v. Gilmore*, 1 Comst. R. 321.

I think, however, the authority of the cases maintaining this distinction is outweighed by that of those in which it has been disregarded, and which treat the liability of an endorser in blank of a negotiable note, to which he is no party, as the same as that of an endorser, under similar circumstances, of a note not negotiable. *Baker v. Briggs*, 8 Pick. R. 122; *Ulen v. Kittredge*, 7 Mass. R. 233; *Moies v. Bird*, 11 Mass. R. 436; *Austin v. Boyd*, 24 Pick. R. 64; *Tenney v. Prince*, 4 Pick. R. 385; *Sylvester v. Downer*, 20 Verm. R. 355; *Martin v. Boyd*, 11 N. Hamp. R. 385; *Beckwith v. Angell*, 6 Conn. R. 315; *McGuire v. Bosworth*, 1 Louisian. R. 248. From these and other cases to the same effect, I deduce that if a third party put his name in blank upon the back of a negotiable promissory note made payable to another party, and to which he is a stranger, while the same remains in the hands of the maker, he will be presumed, in the absence of controlling proof to the contrary, to have intended to give the note credit and currency; and if the endorsement was at the time of the making of the note, he may be treated by the payee as an original promiser or joint maker of the note. If the endorsement were after the date of the note, however long, the payee may treat him as a guarantor, and may write over the signature a guaranty consistent with the nature of the case. And the fair and reasonable, if not necessary, inference from cases which have occurred in this court will bring us to the same result. See *Douglass v. Scott*, 8 Leigh 43; *Watson v. Hurt*, 6 Gratt. 633; *Orrick v. Colston*, 7 Gratt. 189.

Thus, then, when the plaintiff produced the note to Roach & McGuire, with the names of John & George

Gibson endorsed, Roach & McGuire had a right to presume that it had been endorsed by the Gibsons for the purpose of giving it credit and currency, and that if they took it they would be entitled to treat the Gibsons as responsible to them—whether as original makers or as guarantors, is immaterial; for we are not at all concerned here with the enquiry what would be the nature of the liability of the Gibsons to Roach & McGuire if the endorsement had been genuine, the effect being the same either way, for the purposes of this case; and if the endorsement were forged, the very fraud would be committed which it was the design of the statute to punish as a felony.

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Nor is the view which I have taken unsupported by authority in criminal jurisprudence. *Wicks' Case*, Russ. & Ry. Cr. Cas. Res., p. 149, is strongly in point. There the prisoner, having in his possession what purported to be a bill of exchange for fifty pounds, drawn by Rimmington & Co., payable to their own order, but not endorsed in their name, offered the same for discount at the banking house of Stephens, and the same was discounted, and the proceeds, less the discount, paid over to him. At the time of the discount of the bill he endorsed it, but not in his own name. It was urged that as there was no endorsement by the payees, the instrument was not valid as a negotiable bill of exchange, and could not be available in the hands of the party to whom it was uttered, even if it were a genuine bill. The argument, however, did not prevail, and the prisoner was convicted. And the case having been reserved, at a meeting of the judges, all who were present, being nine in number, agreed that the conviction was right. In *Winterbottom's Case*, 1 Denison 41, 5 British Cr. Cas. Res. 42, the prisoner was indicted on stat. 11 Geo. iv, and 1 Wm. iv, for the forgery of an endorsement on a bill of exchange. The bill was payable to four persons named, who were

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styled executrixes of one John Isherwood deceased. The forgery charged was of the name of one of those persons. The prisoner was convicted, but the case was reserved. At the hearing before the Court for crown cases reserved, it was urged that the endorsement, being of one of the payees only, would not be valid even if genuine; for it would not transfer the property in the bill, and so could not defraud. The court, however, after taking time to consider, held the conviction right.

The only plausible objection to the views above presented is one suggested by the language of the indictment. The writing is described as purporting to be the "endorsement" of John & George Gibson; and it may be said that, as the simulated liability of the Gibsons was thus that of "endorsers," we are not at liberty to give effect to the allegation by resorting to a liability of a different character, which would result from their names being found upon the note if the signatures were genuine. I think, however, the objection would be more specious than sound. There is no reason for restricting the term "endorsement" to the technical sense applied to it in the *lex mercatoria*. The primitive and popular sense of something written on the outside or back of a paper, on the opposite side of which something else had been previously written, should be given to the word whenever the context shows it to be proper, or it is necessary to give effect to the pleading or other instrument in which it may occur. And such is the sense in which it should be understood in this indictment; for the technical sense would not give effect to the simulated liability on the part of the Gibsons, which it must be intended was designed to be averred. Upon this point, also, *Winterbottom's Case*, above referred to, may be cited as strongly favoring this mode of construction.

The motion for a new trial, upon the facts proved in

the case, involves no other question than that which I have attempted to discuss on the objection to the indictment. What I have already said, therefore, renders a separate consideration of this motion unnecessary.

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I am of opinion to affirm the judgment.

The other judges concurred in the opinion of *Lee, J.*

JUDGMENT AFFIRMED.

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ABSENT DEBTORS.

1. The act of April 3d, 1852, Sess. Acts of 1852, ch. 95, § 1, p. 78, gives a remedy in a court of equity against an absent debtor, where the debtor has estate or debts due to him in the county or corporation in which the suit is brought.

O'Brien & als. v. Stephens & als., 610

2. The affidavit required by the statutes to authorize a creditor to sue out an attachment against the effects of an absent debtor may be made either before or after the bill is filed. *Idem*, 610

3. When the court has properly taken jurisdiction of a cause against an absent debtor it must proceed to give relief according to the principles of equity. *Idem*, 610

4. If an absent debtor does not appear in the cause, there cannot be a personal decree against him; but the attached effects can be alone subjected. But if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects. *Idem*, 610

5. If the absent debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him. Or the plaintiff may, after the debtor's appearance, make the affidavit, sue out an attachment, and have it levied on the effects of the debtor, and have them subjected. *Idem*, 610

6. A demurrer to a bill against an absent debtor will not lie for the failure to aver that an attachment had issued; because the statute in terms provides that this process may issue after the institution of the suit. *Idem*, 610

7. The statute, 1 Rev. Code, p. 475-6, § 4, which provides that a decree against an absent defendant shall, after seven years, stand absolutely confirmed against him, does

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ADVERSARY POSSESSION.

1. In a writ of right the tenant, to defend his possession under the statute of limitations, may show a possession anterior to his patent; and to show color of title may introduce the entry and survey upon which his patent issued. But as there cannot be an adversary possession against the commonwealth, he cannot show possession further back than the senior grant.

Koiter v. Rankin's heirs, 420

2. The effect of a patent issued upon an inclusive survey, and the right of a tenant claiming under it to show possession under color of title, is the same as in other grants. He may give in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey made in pursuance of the order: But he cannot show possession further back than the senior grant.

Idem, 420

3. To protect himself under the statute of limitations, the tenant must show continued adversary possession, for the time of limitation, of some part of the land in controversy. Actual possession of a part of his land, outside the boundaries of the demandant's elder patent, is not sufficient.

Idem, 420

4. When patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition.

Idem, 420

5. Senior patentee holds and cultivates his land outside of an interlock. Junior patentee afterwards takes possession, and clears and cultivates his land outside of the interlock, and clears and encloses a part of the interlock, and exercises such acts of ownership over the whole as constitutes adversary possession; and after five years dies. The possession of the heirs is not limited to their enclosure: And the entry of the senior patentee upon the heirs is tolled; and he cannot recover by a warrant of unlawful detainer.

Kincheloe v. Tracewells, 587

6. An entry upon land in the possession of another, in order to consti-

tute an ouster and give adversary possession to the party entering, must be with claim of title: But the claim of title need not be under a deed or other writing; or if it is under a deed, it is not necessary that his possession shall be restricted to what shall prove to be within the precise boundaries of his deed.

Idem, 587

7. If possession be taken under a mistake as to the true boundary, the fact is immaterial in a proceeding for an unlawful entry and detainer.

Idem, 587

8. One of several heirs of his father took possession of land, claiming that it was devised to him for life, remainder to his sons, by his father, by a will that was lost; and he held it for his life, and his sons and those claiming under them held it after his death, claiming under this title. This taking and holding possession was adverse to the other heirs; and the statute of limitations commenced to run from the time of such taking possession.

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2. The amendments authorized by the act are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial or evidence *aliunde*: And the amendments authorized are amendments to support the judgment, not amendments to give ground for reversing it.

Idem, 822

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1. An instruction given by the court, which, upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment.

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2. An exception to an opinion of the court, refusing an instruction asked for, does not state the facts of the case so as to show its relevancy. The appellate court will not undertake to decide whether the court below did right or wrong in refusing the instruction.

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3. Though the court should err in deciding upon a proposition submitted to it, yet if it can be seen from the bill of exceptions that the decision did not and could not affect the merits of the case, it is not ground for reversing the judgment.

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4. A *scire facias* to revive a judgment stated that it had been suspended by an injunction, which had been dissolved. A plea that the injunction had not been dissolved is bad; and an issue made up upon it is immaterial. Therefore, though improper evidence upon it is admitted, it is no cause for reversing the judgment.

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5. The protest of a negotiable instrument being sufficient to bind the endorser, if parol evidence in aid of it is inadmissible, yet its admission is no ground for reversing the judgment.

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6. Where an issue is directed in a chancery cause, and a verdict is found, to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court as the established facts of the case. *Lee's ex'or v. Boak*, 182

7. A demurrer to a declaration having been overruled in the court below, and there being a judgment for the plaintiff, upon appeal the judgment is reversed and the demurrer sustained. The cause will be sent back, with leave to the plaintiff to amend his declaration.

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1. An executor has authority to

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ARDENT SPIRITS.

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Head's Case, 819

ASSIGNOR AND ASSIGNEE.

1. W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors sue T and recover a judgment; and he enjoins it on the ground that G owed him for a legacy left him by R, of whom G was executor; and the injunction is perpetuated. The executors of H are entitled to be substituted to the rights of T against G's estate, and are not confined to their remedy on the assignment of W.

Braxton, adm'r, &c., v. Harrison's ex'ors,

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2. Though the injunction was improperly perpetuated, yet as G's administrator was a party to the suit and consented to the decree, and all the parties acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands of a subsequent representative of G. *Idem*, 30

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1. See *Absent Debtors, passim*, and *O'Brien & als. v. Stephens & als.*, 610
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2. A party contracts a debt in the state, and soon thereafter removes out of the state, and after seven years dies. To a proceeding by foreign attachment to recover the debt, the statute of limitations is a bar.

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1. Virginia, by statute, cedes to the United States two hundred and fifty acres of land at Old Point Comfort, and directs the governor to convey it. He directs a survey of the land, and, upon the report of the surveyor, executes a deed to the United States, and takes the courses and distances from the report, but does not refer to it in terms. In determining the boundaries of the land ceded to the United States, the statute, the report and the deed are all to be looked to in order to ascertain what boundary was intended.

French v. Bankhead, 136

2. Looking to the statute, the report and the deed, the intention was

to convey by the high water mark, and that is the boundary of the conveyance. And under the act, 1 Rev. Code of 1819, ch. 87, p. 341, the conveyance to the high water mark boundary passed to the United States the soil and jurisdiction to the low water mark. *Idem*, 136

CARRIERS.

1. Carriers of passengers by stages are liable for injuries resulting from the slightest negligence on the part of the driver or proprietor of the coach; and they are bound to use the utmost care and diligence of cautious persons to prevent injury to the passengers.

Farish & Co. v. Reigle, 697

2. Where a passenger is injured by the upsetting of the coach, the presumption is that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach, to show that there was no negligence whatsoever.

Idem, 697

3. Though the proprietors of the coach may show that it was reasonably strong, with suitable harness, trappings and equipments, of sufficient strength and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of the passengers; yet, if the upsetting of the coach was caused by the running off of the horses, and such running off of the horses might have been avoided if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach will be liable for the injuries sustained by a passenger.

Idem, 697

4. If the coach was upset by the running off of the horses, and if they ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the coach to run on them; and if the running off of the horses might have been prevented if they had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake, the proprietors are liable.

Idem, 697

5. Carriers of passengers by stages are bound to provide not only good

coaches, harness, and equipments of the kind used on their line, but they are bound to provide such as will best secure the safety of the passengers. *Idem*, 697

6. If the coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. *Idem*, 697

7. In actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of damages must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Idem*, 697

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1. In a *caveat* , where the objects called for in the entry are not of such public notoriety as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence, and are such as is required to make a valid entry; and a finding defective in these respects will not be remedied by finding that the survey was made in conformity with the entry. *McNeel v. Herold*, 309

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1. In construing the Code of 1849, the rule of construction is that the old law was not intended to be altered unless such intention plainly appears. *Parramore v. Taylor*, 220

2. If parties, in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense.

Findley's ex'ors v. Findley, 434

3. In construing a provision in a will, the whole instrument is to be looked to to ascertain the intention of the testator.

Cheshire v. Purcell, 771

4. In construing a will, if the language be popular and ordinary, its meaning is to be construed according to its usual acceptance; if technical legal terms be used, they are

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1. If parties, in making a contract, use words of definite legal signification, they must be understood as using such words in their definite legal sense.

Findley's ex'ors v. Findley, 434

2. By an agreement in contemplation of marriage, the intended husband binds his estate to pay the intended wife certain sums of money, if she survived him; which were to be in bar of and in full compensation for her dower. This agreement bars her of dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate.

Idem, 434

3. Whenever the party originally bound by a contract continues bound to pay, the promise of a third party to pay is a collateral promise, and is not binding unless in writing.

Noyes' ex'x v. Humphreys, 636

4. Where the promise is to pay for the whole work done, as well that done before as that done after the promise, even if the promise would have been valid as to the work to be done, yet being collateral as to that which had been executed, and being an entire promise, it is void as to the whole unless it is in writing.

Idem, 636

5. A contractor for the construction of a bridge on a railroad, having received the monthly estimates based on a particular construction of his contract without objection, will be held to have acquiesced in that con-

struction of the contract, and to be bound by it.

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6. The contract providing that the final estimate of the engineer shall be conclusive upon the parties to the contract, that is a valid contract; and the estimate of the engineer, in the absence of fraud or mistake, is conclusive.

Idem, 676

7. If the contractor might have refused to abide by the final estimate of the engineer, yet having submitted his charges for the work done to the engineer, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer.

Idem, 676

8. The engineer having the right, under the contract, to stop the work, if the means for carrying it on should fail, and having informed the contractor that the work must be stopped unless he would receive his monthly payments in orders which were at a discount, and the contractor having consented to receive them, he is not entitled to recover for the amount of the depreciation of said orders.

Idem, 676

9. Though it is generally true that an administrator cannot create a new cause of action against the estate, yet he may make a valid contract to pay a debt not barred by the statute of limitations out of the assets of the estate, upon which a suit may be maintained.

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distances from the report, but does not refer to it in terms. In determining the boundaries of the land ceded to the United States, the statute, the report and the deed are to be looked to to ascertain what boundary was intended.

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2. Looking to the statute, the report and the deed, the intention was to convey by the high water mark, and that is the boundary of the conveyance. And under the act, 1 Rev. Code of 1819, ch. 87, p. 341, the conveyance by the high water mark boundary passed to the United States the soil and jurisdiction to low water mark. *Idem, 136*

3. A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass the title to the grantee.

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Smith's adm'r v. Betty & others, 752

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Johnston & wife v. Slater & al., 321

2. A deed of trust which, among other things, conveys growing crops of wheat, rye and oats, and which is not to be enforced for two years from its date, is not fraudulent *per se* as to creditors.

Cochran v. Paris & als., 348

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3. Though the deed be executed without the knowledge of the credi-

tors secured by it, yet if, when informed of its execution, they assent to it, it is valid. *Idem, 348, 778*

4. A deed which provides in the first place amply for all the then existing debts of the grantor, and then settles the balance of the property on the grantor's family, in the absence of actual fraud, is a valid deed.

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2. All civil causes of which the Circuit court has either original or appellate jurisdiction may be removed from the County to the Circuit court, upon motion, after they have been pending in the County court for one year. *Idem, 527, 587*

3. The year is to be counted from the organization of the court summoned to try the unlawful detainer. *Idem, 527*

4. An unlawful detainer case removed to the Circuit court is properly placed on the docket at the head of the civil causes in the court. *Idem, 527*

5. The act, Code, ch. 96, § 3, p. 443, vests in the County courts a discretion to grant or refuse a license to keep a tavern, in the exercise of which discretion they cannot be controlled by the Circuit courts, either by *mandamus*, writ of error or *certiorari*. *Yeager, Ex parte*, 655

6. Though the applicant for a license to keep a tavern may bring himself fully within and up to all that the statute requires, so that the County court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license as that the County court may be coerced to grant it.

Idem, 655

7. It seems that the County court is bound to act upon every application for a license which is made to it; and if it refuses to act, the Circuit court will coerce it by *mandamus*: But when the County court does act, its judgment and discretion are not to be controlled. *Idem*, 655

CREDITOR AND DEBTOR.

1. A settlement which gives to the grantor a bare maintenance with his wife, for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after contracted debts. *Johnston v. Zane's trustees & als.*, 552

2. See *Practice in Chancery*, No. 8, and *Williams v. Williams*, 95

3. See *Conveyances—Fraudulent*, *passim*.

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. *QUERE*: If the act, Code, ch. 181, § 5, p. 681, in relation to amendments of a record by a judge in vacation, applies to records in cases of felony. *Powell's Case*, 822

2. The amendments authorized by the act are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial, or evidence *aliunde*: And the amendments authorized are amendments to support the judgment, not amendments to give a ground for reversing it. *Idem*, 822

3. If a justice of the peace convicts

a free negro of returning to the commonwealth, this is a misdemeanor; and the free negro is entitled to an appeal if he asks it: And if the justice refuses to allow the appeal, the Circuit court will coerce him by *mandamus* to allow it.

Morris, Ex parte, 292

DAMAGES.

In actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of damages must govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Farish & Co. v. Reigle*, 697

DECLARATIONS.

See *Evidence*, No. 11, 12, 13, 14, and *Smith's adm'r v. Betty & others*, 752
Same v. Thurman & others, 752

DECREES.

1. A decree of a court of equity set aside for fraud, upon a bill against the heirs at law of the party procuring the decree.

Evans & als. v. Spurgin & als., 615

2. A decree obtained against an absent defendant by fraud is not protected after seven years by the act, 1 Rev. Code 1819, p. 475-6, § 4.

Idem, 615

3. See *Absent Debtors*, *passim*, and *Idem*, 615
O'Brien & als. v. Stephens & als., 610

DEEDS.

1. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.

Johnston & wife v. Slater & al., 321

2. A deed admitted to record upon proof by subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded.

Idem, 321

3. A party claiming title under a deed from a deputy sheriff, for land sold for nonpayment of taxes, under the act of February 9th, 1814, must show that the person described as high sheriff was such, and that the grantor in the deed was his deputy.

Hobbs v. Shumates, 516

4. Though such deed recites an insufficient advertisement of the property conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey. *Idem, 516*

5. If a deed is correctly read to the grantor, his misunderstanding of it cannot affect its validity as a deed.

Harrison v. Middleton, 527

6. A deed conveying land then, and continuing to be, in the actual adversary possession of another, cannot operate to pass title to the grantor. *Kincheloe v. Tracewells, 587*

7. See *Conveyances—Fraudulent, passim.*

8. If a deed of a defendant is introduced collaterally upon a trial as evidence, he may show that it is not his deed without making oath to the fact. *Harrison v. Middleton, 527*

9. As to declarations of a grantor in a deed and of an agent in procuring the deed for the grantee. See *Evidence, No. 12 13, 14, and*

Smith's adm'r v. Betty & others, 752
Same v. Thurman & others, 752

DELINQUENT AND FORFEITED LAND.

1. Though an adversary possession of lands had commenced to run against the true owner, yet upon the forfeiture of the land to the commonwealth, under the delinquent land laws, the possession, until the land is sold by the commonwealth, is no longer adversary against her, or her grantee claiming under a conveyance from a commissioner of delinquent lands.

Levasser v. Washburn, 572

2. The forfeiture of land for the failure to enter it upon the commissioner's books and pay the taxes and damages upon it was effected by the statute; and required no judicial proceeding to complete it. The forfeiture was therefore complete at the time fixed by the statute. *Idem, 572*

3. The act of March 18th, 1841,

Sess. Acts, p. 31, relinquishing the commonwealth's right to forfeited lands to a junior patentee in possession, only applies to those whose patents bear date prior to the 1st of April, 1841. *Idem, 572*

4. A patent for land that had been previously granted by the commonwealth, and had been forfeited under the delinquent laws, passes nothing to the patentee; and a conveyance of the land forfeited, by the commissioner of delinquent land, passes the title vested in the commonwealth by the forfeiture. *Idem, 572*

5. See *Tax Sales, No. 1, 2, and*

Hobbs v. Shumates, 516

DEMURRER.

A demurrer to a declaration overruled, and judgment for plaintiff, which upon appeal is reversed and demurrer sustained; the cause will be sent back with leave to the plaintiff to amend his declaration.

Fitzhugh's ex'or v. G. F. Fitzhugh, 300

DEPOSITIONS.

A deposition purporting in the caption to have been taken in the state and county designated in the commission and notice, and certified by a person who adds to his name the letters J. P., is duly authenticated.

Hobbs v. Shumates, 516

DETINUE.

The fact that slaves are on the premises of a person who makes no claim to them, his infant daughter, who claims them, living with him, will not sustain an action of detinue against him for the slaves, by a party entitled to them.

B. Staton v. Pittman, sheriff, 99
Pittman, sheriff, v. R. Staton, 99

DEVISEES.

1. Testator by his will gave his wife a plantation, slaves, stock, &c., for life: And he then added, It is understood that my wife is to keep my children and raise them, and give them sufficient schooling. **Held:**

1st. The widow takes the bequest *cum onere*, and is bound to provide for the support and education of the

children, in a manner suitable to her circumstances.

Crawford's ex'or v. Patterson, 364

2d. But if one of the children goes to live with a married aunt, the widow being willing to keep the child and provide for her, the widow is not bound for the expenses of the child for board, clothing, and education.

Idem, 364

2. It seems that a void condition precedent annexed to a devise of land will prevent the vesting of the devise in the devisee.

Maddox & al. v. Maddox's adm'r & als., 804

DONATIO MORTIS CAUSA.

A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or of the donee.

Lee's ex'or v. Boak, 182

DOWER.

1. By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money, if she should survive him, which were to be in bar of and in full compensation for her dower. This agreement barred her of dower in her husband's real estate.

Findley's ex'ors v. Findley, 434

2. Purchaser of land gives bond with security for the purchase money; and eighteen months afterwards gives a deed of trust on the land as a further security; and the land is afterwards sold. The widow of the purchaser is entitled to dower in the land.

M. Blair v. Thompson & als., 441

3. In a bill by a widow for dower in land sold in the lifetime of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant.

Idem, 441

4. There cannot be a decree for a specific sum in lieu of dower, without the assent of all the parties interested.

Idem, 441

EJECTMENT.

1. A party in peaceable possession is entered upon and ousted by one

not having title to or authority to enter upon the land. The party ousted may recover the premises in ejectment, upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself has title or authority to enter under the title.

Tapscott v. Cobbs & als., 172

2. Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against any one who has entered upon the land without title or authority to enter under the outstanding title in another. *Idem*, 172

3. In ejectment the jury set out the wills of a grandfather and father; and if the son, who is dead, took under the father's will, they find for the plaintiff; if he took under the grandfather's will, they find for the defendants. The verdict is sufficiently certain, and submits the single question upon the construction of the wills to the court.

Callis & als. v. Kemp & als., 78

4. Though in ejectment, the plaintiffs in their declaration claim the whole tract of land, the jury may find for them for an undivided interest in it. *Idem*, 78

5. Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries; but the interest being certain, that is sufficient. *Idem*, 78

ENDORSEMENTS.

The word "endorsement," construed in a popular sense, in an indictment for forgery.

Powell's Case, 822

ENTRY OF LAND.

1. An entry of waste and unappropriated land, to be valid, must call for objects which possess that notoriety in themselves, or they must be so particularly described that other

persons, by using due care and reasonable diligence, may readily find them. *McNeel v. Herold*, 309

2. What certainty there must be in the general and particular calls of an entry. *Idem*, 309

3. The objects called for are sometimes so connected with the general history or geography of the country, or its legislation, that the courts will take notice of them; and they will be deemed of general notoriety, and sufficiently identified without further proof. *Idem*, 309

4. When the objects called for possess but a local notoriety, the party affirming the validity of the entry must prove the identity of the land intended to be appropriated; and that the calls of the entry are such that a subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish it from the surrounding lands, so as to appropriate for himself the adjacent residuum. *Idem*, 309

EQUITABLE JURISDICTION AND RELIEF.

1. *QUERE*: Whether a party may set up in a second suit pretensions inconsistent with the allegations of his bill and his pretensions in his first suit.

Frazer's adm'r v. Beville & als., 9

2. Under the circumstances, a person who had qualified as administrator of an estate in Mississippi, held to account for his administration in Virginia.

Powell v. Stratton & als., 792

3. See *Executors and Administrators*, No. 22, 24, and

Braxton, adm'r, &c., v. Harrison's ex'ors, 30

4. Courts of equity have jurisdiction in all cases to compel an executor to deliver a specific legacy.

Nelson's adm'r v. Cornwell, 724

5. See *Legacies & Legatees*, No. 9, and

Frazer's adm'r v. Beville & als., 9

6. Money lent by a bachelor uncle to his nephew, to secure which a deed of trust was executed, was held, under the circumstances, to have been given and released by the uncle to the nephew, so that a court of equity would refuse to enforce the

trust at the suit of the executors of the uncle.

Fitzhugh's ex'ors v. Fitzhugh, 210

7. A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion: Nor will a suit be entertained to compel a trustee to exercise his power.

Cochran v. Paris & als., 348

8. Testator gives his estate to his executors for the benefit of his son, and, if they should judge that it would be prudent to invest him with it, to turn it over to him. The executors having declared their judgment that the son may be entrusted with the estate, equity will compel them to turn it over to him.

Idem, 348

9. Under the circumstances, equity set aside a sale made by a trustee, on a bill by the grantor in the deed of trust against the purchaser, who was the principal creditor secured by the deed.

Rossett v. Fisher & als., 492

10. As to the court which has jurisdiction in an injunction case.

Beckley v. Palmer & als., 625

11. When a court has not jurisdiction to enjoin an execution. See *Injunctions*, No. 3, and *Idem*, 625

EVIDENCE.

1. How witness may refresh his memory. See *Witness*, No. 4, 5, 6, and *Harrison v. Middleton*, 527

2. Parol evidence that the clerk of a drawee of a bill of exchange was authorized to refuse acceptance of the bill is admissible in an action by the holder against the endorser.

Stainback v. The Bank of Virginia, 260

3. In the case of a joint purchase of land by two, parol evidence is not admissible to prove an agreement between them for an unequal division of the land.

Jarrett v. Johnson, 327

4. A certificate of the secretary of state of Ohio, under the great seal of the state, that a statute certified is correctly copied from the original rolls on file in his office, is a due authentication of the statute, according to the act of congress.

Wilson v. Lazier & als., 477

5. Upon a trial, the defendant introduces a bond on which a receipt is endorsed, which receipt is attested by a witness. The receipt is evidence for the plaintiff without his calling the witness to prove it.

B. Staton v. Pittman, sheriff, 99
Pittman, sheriff, v. R. Staton, 99

6. In debt on a bond for money loaned, upon the plea of *non est factum*, defendant relies on the fact that the obligee did not have the means to lend the money; and to rebut this the plaintiff introduces evidence to show he had money as executor. The defendant may introduce the settlements made by the plaintiff of his accounts as executor, to show he did not have the money from that source.

McDowell's ex'or v. Crawford, 377

7. In such a case a note from the defendant to the plaintiff, delivered some days before the trial, authorizing the plaintiff to introduce his books as evidence, if he will allow them to be examined by defendant's counsel previous to the trial, is not admissible evidence for the defendant for any purpose. *Idem, 377*

8. Proof that a deed when read was understood in a very material respect, as different from what it is, may tend to show that it was misread; and therefore is competent evidence. But if the deed was correctly read, the misunderstanding of it by a party cannot affect its validity as a deed. *Harrison v. Middleton, 527*

9. A cause is brought on to be heard upon the bill, answer, exhibits, and award; *quare*, if the depositions and commissioner's report are a part of the record, and evidence as such in a case in which the record is evidence.

Nelson's adm'r v. Cornwell, 724

10. *QUERE*: If the record of a suit by parties claiming the estate against the executor is evidence against a specific legatee who was not a party.

Idem, 724

11. Declarations of a person who had been the agent in procuring a deed for another, made either before the negotiation for the deed commenced, or after the execution of the deed was completed, are incompetent evidence against the grantee in the deed, to show that provisions which were intended to be inserted

in the deed had been fraudulently omitted.

Smith's adm'r v. Betty & others, 752
Same v. Thurman & others, 752

12. But acts and declarations of such person done or made whilst the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to show fraud. *Idem, 752*

13. The declarations of a grantor in a voluntary deed, made after its execution, are not competent evidence against the grantee, to show that provisions which were intended to be inserted have been fraudulently omitted. *Idem, 752*

14. Nor are the declarations of the grantor made before the execution of the deed competent evidence against the grantee, in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured. *Idem, 752*

15. In a writ of right or ejectment, the tenant may show the entry and survey on which his patent is founded, in order to show adversary possession under claim of title.

Koener v. Rankin's heirs, 420

EXCEPTIONS—Bill of.

1. An exception to an opinion of the court refusing an instruction asked does not state the facts of the case so as to show its relevancy. The appellate court will not undertake to decide whether the court below did right or wrong in refusing the instruction.

Fitzhugh's ex'or v. G. F. Fitzhugh, 300

2. An exception to the refusal of the court to grant a new trial only states the evidence, which is parol. The court will only consider the evidence of the appellee.

Parish & Co. v. Reigle, 697
Noyes' ex'x v. Humphreys, 636

EXECUTORS AND ADMINISTRATORS.

1. An action on the case for fraud, in selling to the plaintiff an unsound slave, which he was induced to purchase by means of a false and fraudulent warranty of soundness, or by the fraudulent concealment of the unsoundness of the slave, cannot be

maintained against the personal representative of the vendor.

Boyles' adm'r v. Orerby, 202

2. A personal representative cannot be sued as such for services or goods furnished to his testator's or intestate's estate since his death.

Fitzhugh's ex'or v. G. F. Fitzhugh, 300

3. It seems that an action will not lie against the personal representative as such for the funeral expenses of his testator or intestate.

Idem, 300

4. In some cases where money has been paid for a deceased person, an action for money paid will lie against the personal representative as such: As where money has been paid as a joint surety.

Idem, 300

5. Where the demand in all the counts of the declaration are such that an action cannot, in any case, be maintained upon them against the personal representative as such, then the description of him as such may be treated as surplusage, and the judgment may be against him personally.

Idem, 300

6. But if the demand set out in one of the counts may possibly be maintained against the personal representative as such, then the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative character, it must fail.

Idem, 300

7. If an executor has assented to a legacy, and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery: But the intention to dispense with a refunding bond must be very clear.

Nelson's adm'r v. Cornwell, 724

8. In a proceeding to recover damages against the Upper Appomattox Company under the 9th section of the act of 23d of February 1835, Sess. Acts, p. 82, the jury having returned their report ascertaining the damages, and the company having excepted to it, and obtained a continuance, the plaintiff dies. The proceeding may be revived by the administrator; but not by the heirs.

Upper Appomattox Co. v. Hardings, 1

9. Executors or administrators with the will annexed, who are lega-

tees of slaves under the will, agree upon a division of the slaves, and each takes possession of those allotted to him. This is an assent to the legacy by the executors or administrators.

Frazer's adm'r v. Beville & als., 9

10. The legacy to one is for life, with remainder over upon his dying without issue. The assent to the legacy in favor of the first taker is an assent in favor of the contingent legatee over.

Idem, 9

11. Though an executor assents to a specific legacy, he does not thereby dispense with a refunding bond.

Nelson's adm'r v. Cornwell, 724

12. An executor, though he has authority to submit a matter to arbitration, yet is responsible as for a *devastavit*, if by the award his testator's estate is injured.

Idem, 724

13. An executor making an improvident submission to award, as to a part of his testator's estate which has been specifically bequeathed, and the result of the submission being that the property is left in his hands as his own property, and he is compelled to pay for it, the legatee is not precluded by the award from recovering the specific property.

Idem, 724

14. An administrator in Mississippi having purchased for the estate land sold for the payment of a debt due to the estate, held under the circumstances, not bound to keep the land and account for the price; but the land is to be treated as the property of the estate.

Powell v. Stratton & als., 792

15. Under the circumstances, the administrator not held responsible for money which became worthless in his hands by the insolvency of the bank.

Idem, 792

16. Under the circumstances, a person who had qualified as administrator upon an estate in Mississippi, held to account for his administration in Virginia.

Idem, 792

17. Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by an executor.

Nelson's adm'r v. Cornwell, 724

18. The statute of limitations cannot bar the legatee's claim to his specific legacy, whilst it is held as

such by the executor, though he has long before assented to the legacy.

Idem, 724

19. A delay of seventeen years by a specific legatee to sue for his legacy, held under the circumstances not to bar his claim.

Idem, 724

20. In a suit by a legatee claiming upon the death of the legatee for life without heirs, against said legatee and a purchaser of one of the slaves so bequeathed, under an execution against him, another executor, who is also a legatee, is a competent witness for the contingent legatee, to prove the division of the slaves and the assent to the legacy.

Frazer's adm'r v. Berill & als., 9

21. W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors sue T and recover a judgment, and he enjoins it on the ground that G owed him for a legacy left him by R, of whom G was the executor; and the injunction is perpetuated. The executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy upon the assignment of W.

Brarton, adm'r, &c., v. Harrison's ex'ors, 30

22. In this injunction suit the executors of H and W and the administrator *de bonis non* of G are parties, and the decree perpetuating the injunction is by consent; and they also consent to a decree directing an account of G's estate by his administrator. **Held:**

1st. It is a case in which there may be a decree between codefendants in favor of the executors of H against G's estate.

Idem, 30

2d. That to ascertain whether there were assets of G's estate to pay the debt, the account might be directed.

Idem, 30

3d. If the decree against G's estate was more doubtful, the consent of the representatives of W and G clearly authorized it.

Idem, 30

23. Though it was improper to perpetuate the injunction, yet as the administrator of G consented to the decree, and all the parties acted in good faith, the executors of H are not thereby deprived of their remedy over against G's estate in the hands

of a subsequent administrator *de bonis non* of G.

Idem, 30

24. Ten years after the decree the second administrator *de bonis non* of G entered into a contract under seal, to pay the debt out of the assets when received; and the executors of H agreed to wait one year to release their costs in the suit, and dismiss it as to them. But the administrator was not to be bound personally; and the executors were at liberty, if the money was not paid in the year, to cancel the agreement, and proceed to enforce any of their existing remedies. The administrator did not collect assets within the year, and the executors sued in equity upon the agreement. **Held:**

1st. Though the right of the executors of H to proceed against G's estate accrued when the injunction was perpetuated, yet the pendency of that suit, carried on for their benefit, prevented the running of the statute of limitations against them.

Idem, 30

2d. Though it is generally true that an executor or administrator cannot create a new cause of action against the estate, yet he may make a valid promise to pay a debt not barred by the statute of limitations out of the assets of the estate, on which a suit may be maintained.

Idem, 30

3d. That there was a sufficient consideration to sustain the agreement, and a suit could be maintained on it by the executors of H against the administrator, for payment out of the assets.

Idem, 30

4th. That it was proper to sue in equity to have an account of, or for marshaling, the assets; and this especially as the agreement being under seal it is doubtful whether an action at law could be maintained upon it.

Idem, 30

25. How an administrator, who is a creditor of the estate, and has exhausted the personal assets in the payment of debts, may subject the real estate. See *Practice in Chancery*, No. 8, and

Williams v. Williams & als., 95

26. When there shall be a judgment for an administrator notwithstanding a verdict against him. See *Jeofails*, No. 1, 2, and

Boyles' adm'r v. Overby, 202

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. If a case of unlawful detainer has been pending in the County court for more than twelve months, without a final decision, it may be removed, on motion, to the Circuit court. *Harrison v. Middleton*, 527

Kincheloe v. Tracewells, 587

2. The year is to be estimated from the organization of the court summoned to try the unlawful detainer. *Kincheloe v. Tracewells*, 587

3. An unlawful detainer case removed to the Circuit court is properly placed on the docket at the head of the civil causes in the court. *Harrison v. Middleton*, 527

4. A landlord sells land in possession of his tenant, by agreement under seal, and the tenant refuses to deliver possession; the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession. *Idem*, 527

5. To entitle the plaintiff to recover possession upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. But if the warrant does not state the withholding possession by the defendant, that may be aided by the complaint which states the fact. *Kincheloe v. Tracewells*, 587

6. When senior patentee cannot recover by an unlawful detainer. See *Adversary Possession*, No. 5, 6, and *Idem*, 587

FORFEITURES.

See *Delinquent and Forfeited Land*, No. 2, and

Levasser v. Washburn, 572

FORGERY.

1. The words "to the prejudice of another's right," in the Code, ch. 193, § 5, p. 733, in relation to forgeries, are descriptive, not of the offence, but of the writings of which forgery may be committed; and it is not, therefore, necessary that they shall be inserted in the indictment in describing the offence. *Powell's Case*, 822

2. The maker of a negotiable note passes it to the payee, with the name

of a third person endorsed upon it, which name he forged. The forging of the name endorsed upon the paper constitutes the offence of forgery. *Idem*, 822

3. The description of the writing in the indictment, as the endorsement of the person whose name is forged, will not vitiate the indictment; though the simulated liability may not be that of a technical endorser, but of a different character. *Idem*, 822

FORTHCOMING BONDS.

1. An award of execution on a forfeited forthcoming bond cannot be successfully resisted on account of the invalidity of the original judgment, unless such judgment is null and void. *Pates v. St. Clair*, 22

2. For the rights and remedies of sureties in forthcoming bonds, see *Sureties*, No. 2, 3, 4, and

Hill v. Manser & al., 522

FRAUD.

1. What provisions in a deed of trust are not fraudulent. See *Conveyances—Fraudulent*, *passim*.

2. A decree of a court of equity set aside on the ground of fraud, upon a bill against the heirs of the party procuring the decree. *Evans & als. v. Spurgin & als.*, 615

3. What arrangement as to property by a debtor is fraudulent as to his creditors, so that the property will vest in the sheriff upon the debtor's taking the oath for the relief of insolvent debtors. *B. Staton v. Pittman, sheriff*, 99

Pittman, sheriff, v. R. Staton, 99

4. See *Insolvent Debtors*, No. 2, 3, 4, and *Idem*, 99

5. See *Guardian and Ward*, No. 5, 6, and

Hunter v. Lawrence's adm'r & al., 111

FRAUDS—Statute of.

1. Wherever a party originally bound by a contract continues bound to pay, the promise of a third person to pay is a collateral promise, and is not binding unless in writing. *Noyes' ex'x v. Humphreys*, 636

2. Where the promise declared on is an entire promise to pay for the

whole work done, as well that done before as that done after the promise made, even if the promise would have been valid as to the work to be done; yet being collateral as to that which had been executed, and being an entire promise, it is void as to the whole unless in writing. *Idem*, 636

FREE NEGROES.

1. The offence of a free negro in coming into the state and remaining therein, in violation of the 28th and 29th sections of ch. 198 of the Code of Virginia, is a misdemeanor, for which he is liable to be prosecuted and punished in the manner provided in the 28th section.

Morris, Ex parte, 292

2. Upon conviction of such a misdemeanor, the party is entitled as of right, under § 15 of ch. 213 of the Code, to an appeal from the decision of the justice to the court of the county or corporation in which his conviction was had; and it is the duty of the justice to allow the appeal, if duly applied for. *Idem*, 292

3. If in such case the appeal is duly applied for and refused by the justice, the party may have relief by *mandamus* from the Circuit court.

Idem, 292

4. If the Circuit court refuses to issue a *mandamus* in such a case, the party may apply to the Supreme court of appeals for a *superedeas* or writ of error, and have the action of the Circuit court reversed. *Idem*, 292

GUARDIAN AND WARD.

1. A bond executed to an executor is transferred by him to a guardian as part of his ward's estate. Whatever interest the ward has in the bond is subject to the control of the guardian, who may receive the money if voluntarily paid; may sue for it in a common law court in the name of the executor, for his own use as guardian, and cannot be prevented by the executor, or he may sell and transfer the bond.

Hunter v. Lawrence's adm'r & al., 111

2. As a general rule, the guardian has the legal title of the ward's personal estate, and has the power and authority to sell it. *Idem*, 111

3. A guardian violates his trust

when he sells or transfers the property of his ward to pay his own debt. *Idem*, 111

4. The fraud of a guardian in disposing of the property of his ward is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties.

Idem, 111

5. The same person is guardian of two wards, and he transfers a bond belonging to one of his wards, to the husband of the other, in payment of his wife's estate, the husband not knowing, or having any reason to suspect, that it belongs to the other ward; and the guardian and his sureties being then wealthy: Afterwards the guardian fails. The husband who received the bond is not responsible to the ward, whose property the bond was, for the amount thereof. *Idem*, 111

6. The principle upon which a party dealing with a fiduciary is held responsible is, that he has co-operated in the fraud of the fiduciary.

Idem, 111

7. What laches of sureties of a guardian will debar them of redress against a party dealing with the guardian. See *Sureties*, No. 1, and

Idem, 111

HEIRS.

1. When heirs not the proper party to revive a proceeding. See *Executors and Administrators*, No. 8, and

Upper Appomattox Co. v. Hardings, 1

2. Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point the heir may maintain ejectment upon the strength of his possession, against any one who has entered upon the land without title, or authority to enter under a title outstanding in another.

Tapscott v. Cobbs & als., 172

3. When the statute of limitations as to remedies for recovery of land runs against *femes covert* and infant heirs. See *Limitations—Statutes of*, No. 10, 11, and

Caperton & al. v. Gregory & als. lessee,

505

HUSBAND AND WIFE.

1. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving due execution of the deed when called in question, or for the purpose of having it admitted to record.

Johnston & wife v. Slater & al., 321

2. By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money if she survived him; which were to be in bar of and in full compensation for her dower. This agreement barred her of dower in her husband's real estate; but does not deprive her of her distributable share of his personal estate.

Findley's ex'ors v. Findley, 434

3. The widow, having renounced the will, is not entitled to take under it the property bequeathed to her: But it is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate.

Idem, 434

4. The widow having received from the executors two bonds of her son by a former marriage, which he had executed to her husband, in part satisfaction of what was due to her under the marriage agreement, and having given to them a receipt for the amount, it is a valid payment to her to that extent.

Idem, 434

5. See *Legacies and Legatees*, No. 16, and

Crawford's ex'or v. Patterson, 364

6. When statute of limitations will run against *femes covert* and their husbands.

Caperton & al. v. Gregory & als.,
lessee, 505

INDICTMENTS.

1. An indictment for selling by retail ardent spirits, to be drunk where sold, must set out the place in the county where the sale is made: It is not sufficient to state the sale to have been made in the county.

Commonwealth v. Head, 819

2. See *Forgery*, No. 1, 3, and
Powell's Case, 822

INFANTS.

1. Though the defendant was an infant when an action was brought against her, yet if she did not set up her infancy to defeat the action, and it may be reasonably inferred from the evidence that she was of full age when the cause was tried, and she appeared and defended herself by counsel, she is bound by the judgment.

B. Staton v. Pittman, sheriff, 99
Pittman, sheriff, v. R. Staton, 99

2. How infants are affected by the statute of limitations applying to remedies for the recovery of land. See *Limitations—Statute of*, No. 11, and

Caperton & al. v. Gregory & als.,
lessee, 505

INJUNCTIONS.

1. A defendant in an execution files a bill to enjoin it, on the ground that a previous execution sued out on the same judgment had been levied by the sheriff on the property of another defendant in the execution sufficient to discharge it. In such a case the bill must be filed in the county where the judgment was recovered; and the Circuit court of another county has no jurisdiction.

Beckley v. Palmer & al., 625

2. In such a case it is not necessary that the objection to the jurisdiction shall be taken by demurrer or plea; but it may be taken at the hearing of the cause.

Idem, 625

3. If in such case the plaintiff insists that the sheriff has misapplied the proceeds of the property levied on, or that a payment has been made to him which has not been credited on the execution, if he had an opportunity to apply to the court of law from which the execution issued for redress, he has no right to come into a court of equity for relief.

Idem, 625

4. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either plaintiff or defendant; and the injunction operates upon the judgment on the

scire facias to restrain the issue of an execution thereon.

Richardson's adm'r v. Prince
George justices, 190
Poindexter's adm'r v. Same, 190

INSOLVENT DEBTORS.

1. What arrangement of property by a debtor is fraudulent as to his creditors, so as to vest it in the sheriff upon the debtor's taking the oath for the relief of insolvent debtors.

B. Staton v. Pittman, sheriff, 99
Pittman, sheriff, v. R. Staton, 99

2. Though the insolvent debtor never had possession of the property, but it was transferred by a fraudulent arrangement to a third person, the sheriff may recover the property from this third person. *Idem, 99*

3. Though the property, which consisted of slaves, was sent to the premises of B, the father of the person to whom the property was transferred, and who was an infant and lived with B, and she claimed it and B did not, B is not liable for it.

Idem, 99

4. When property given in trust by a testator for his son will be subject to the son's debts, and vest in the sheriff upon the son's taking the oath for the relief of insolvent debtors. See *Trusts and Trustees*, No. 2, and *Cochran v. Paris & als., 348*

INSTRUCTIONS.

1. An instruction given by the court, which, upon the statement of the evidence given by the party excepting, could not be injurious to him, is no ground for reversing the judgment. *Colvin v. Mcufree, 87*

2. The court may refuse to give an instruction because it is so obscurely expressed as to leave in doubt the meaning intended.

Levasser v. Washburn, 572

3. Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is and which is not legal.

Kincheloe v. Tracewells, 587

4. The court should refuse to give

an instruction where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause; or where it is irrelevant or not applicable to the evidence. *Idem, 587*

5. But if there is any evidence in the cause, though slight, to which the instruction is applicable, and it propounds the law correctly, it is to be given. *Farish & Co. v. Reigle, 697*

6. See *Appellate Court*, No. 2, and *Fitzhugh's ex'or v. G. F. Fitzhugh, 300*

INTEREST.

1. Under the act of March 2, 1827, a landlord is entitled to interest on rent in arrear from the time it was due. *Brooks v. Wilcox, 411*

2. When purchaser bound to pay interest. See *Vendor and Purchaser*, No. 7, and *Bailey v. James, 468*

3. On what payments surety is entitled to have interest.

Hill v. Manser & al., 522

ISSUES OUT OF CHANCERY.

1. Upon an issue directed out of chancery, the verdict of the jury is conclusive when there is no exception spreading the facts upon the record.

Fitzhugh's ex'ors v. Fitzhugh, 210

Lee's ex'or v. Boak, 182

2. In a chancery cause, if upon the state of the proofs at the time an issue is directed, the bill should be dismissed, it is error to direct it: And although the issue is found for the plaintiff, the bill should, notwithstanding, be dismissed at the hearing.

Smith's adm'r v. Betty & others, 752

Same v. Thurman & others, 752

3. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and corroborating circumstances in support of the bill, it is error to direct an issue. The *onus* must be shifted, and the case rendered doubtful by the conflicting evidence of the opposing parties before an issue should be ordered. *Idem, 752*

JEOFAILS.

1. An action on the case against

the personal representative of a vendor, for fraud in the sale of an unsound slave to the plaintiff, which he was induced to purchase by means of a false and fraudulent warranty, or the fraudulent concealment of unsoundness, cannot be maintained; and though there is a judgment for the plaintiff, the error is not cured by the statute of jeofails. 1 Rev. Code 1819, ch. 28, § 103, p. 511.

Boyles' adm'r v. Overby, 202

2. In such a case, though there is a verdict for the plaintiff, judgment should be rendered for the defendant.

Idem, 202

3. An action is misconceived in the sense of the statute, only in a case wherein, upon the trial, the proofs show a cause of action fit to be asserted in a form different from that adopted. The defendant is held liable upon proofs showing a liability; and if no objection is made to the form of the action until after the verdict, the defect is cured. *Idem*, 202

4. To hold a defendant liable upon a cause of action not asserted is going to the utmost verge of the law, even where such cause of action is proved. But to hold him liable for such cause when not proved, or proved by evidence not admissible, if the action had been brought for that cause, is going beyond the letter and spirit of the law. *Idem*, 202

5. The statute, though it will aid defects, whether of form or substance in pleading, where a portion of the matter is appropriate, does not apply to cases to which the matter pleaded is in all its parts merely nugatory, setting forth no cause of action or no ground of defence.

Idem, 202

JUDGMENTS.

1. It was not improper before the act, Code, p. 706, § 9, to render a judgment for costs in favor of a defendant against a person for whose benefit a suit was brought, when the defendant succeeded in the case.

Pates v. St. Clair, 22

2. A judgment being rendered by consent of parties, by their attorneys, is by consent of the party for whose benefit the suit was brought.

Idem, 22

3. The pendency of an injunction

to a judgment at law will not prevent the revival of the judgment upon the death of either plaintiff or defendant; and the injunction operates upon the revived judgment to restrain the issue of an execution thereon.

Richardson's adm'r v. Prince

George justices,

190

Poindexter's adm'r v. Same,

190

4. A surety in a forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of a creditor against the original debtor, subsisting at the time he became bound for the debt. And the judgment, for the benefit of the surety so paying, is not extinguished, but transferred with all its obligatory force against the principal; and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired.

Hill v. Manser & al., 522

5. What court has jurisdiction of an injunction to a judgment. See *Injunctions*, No. 1, and

Beckley v. Palmer & al., 625

LACHES AND LAPSE OF TIME.

1. Under the circumstances, the delay in the prosecution of a pending suit for twenty-three years, held to bar further proceedings in it.

Crawford's ex'or v. Patterson, 364

2. Lapse of time is justly of great weight in controversies about transactions long since past. But this weight is thrown in favor of the party who insists that the state of things existing during the lapse of time shall not be disturbed: It cannot be relied on by parties seeking to change that state of things.

Erans & als. v. Spurgin & als., 615

3. A delay of seventeen years by a specific legatee, to sue for his legacy, held, under the circumstances, not to bar his claim.

Nelson's adm'r v. Cornwell, 724

LANDLORD AND TENANT.

1. For proceedings upon a distress for rent reserved in other thing than money. See *Rents, passim*, and

Brooks v. Wilcox, 411

2. An agreement under seal by a tenant, that he will surrender possession whenever a purchaser from

the landlord requires it, constitutes him a tenant at will or on sufferance; and he is not entitled to six months' notice to quit.

Harrison v. Middleton, 527

3. If a tenant claims to hold adversely to his landlord, he is not entitled to notice to quit. *Idem*, 527

4. A landlord sells land in possession of his tenant, by agreement under seal; and the tenant refuses to deliver possession. The landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession.

Idem, 527

LEGACIES AND LEGATEES.

1. What is an assent to a legacy by an executor. See *Executors and Administrators*, No. 9, 10, and

Frazer's adm'r v. Berill & als., 9

2. An executor, though he assents to a legacy, does not thereby dispense with a refunding bond.

Nelson's adm'r v. Cornwell, 724

3. When specific legatee may sue at law for his legacy. See *Executors and Administrators*, No. 7, and

Idem, 724

4. Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by the executor.

Idem, 724

5. The statute of limitations cannot bar the legatee's claim to his specific legacy whilst it is held as such by the executor, though he has long since assented to the legacy.

Idem, 724

6. A delay of seventeen years by a specific legatee, to sue for his legacy, held, under the circumstances, not to bar his claim.

Idem, 724

7. When specific legatee entitled to recover his legacy, though executor has accounted for it to other parties under an award. See *Executors and Administrators*, No. 13, and

Idem, 724

8. When an assent to a legacy may be proved by one executor at the suit of the legatee, against the other executor and a purchaser under him. See *Executors and Administrators*, No. 20, and

Frazer's adm'r v. Berill & als., 9

9. When a contingent legatee of a remainder may sue the legatee for life and a purchaser under him to

have the legacy forthcoming upon the happening of the contingency.

Idem, 9

10. Bonds of a legatee are given to him by the testator as a *donatio mortis causa*, with the intention that the legatee shall not account for them. They are not an advancement in satisfaction of his legacy.

Lee's ex'or v. Boat, 183

11. Widow having renounced the will and taken her distributable share of the personal estate, the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributable share of the personal estate.

Findley's ex'ors v. Findley, 434

12. A legacy of a remainder in property, on condition that the legatee, a female, shall remain a member of the Society of Friends; there being but five or six single men, members of the society, in the neighborhood of the legatee when she is of a marriageable age, is an unreasonable restraint upon marriage, and void.

Maddox & al. v. Maddox's adm'r

& als.,

804

13. There being no bequest over, and no specific direction that upon breach of the condition the legacy shall fall into the residuum of the estate, the condition is in *terrorem* merely, and does not defeat the legacy.

Idem, 804

14. The bequest of a legacy upon a condition requiring a religious qualification, the condition is against the policy of the law of Virginia, and therefore void.

Idem, 804

15. *QUERE*: If the condition be a condition precedent, the legatee can take the legacy free from the condition; or if the legacy lapses: And it seems the legatee will take the legacy of personal property; and a devise of land would fail.

Idem, 804

16. Testator by his will gave his wife a plantation, slaves, stock, &c., for life: And he then added, It is understood that my wife is to keep my children, and raise them, and give them sufficient schooling. *Held*:

1st. The widow takes the bequest *cum onere*; and is bound to provide for the support and education of the children in a manner suited to her circumstances.

Crawford's ex'or v. Patterson, 364

2d. But if one of the children goes to live with a married aunt, the widow being willing to keep the child and provide for her, the widow is not liable for the expenses of the child, for board, clothing, and education.

Idem, 364

3d. Executors pay the account of the estate of the child in their hands, and on her marriage her husband gives them a receipt for the payment. The widow is not liable to the husband and wife for the amount.

Idem, 364

LIMITATION OF ESTATES.

1. On a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of any expression of a particular intention on the part of the testator, the survivorship has relation to the death of the testator.

Martin's adm'r, &c., v. Kirby, adm'r, &c., & als., 67

2. The testator gives all his estate, real and personal, to his wife for and during her widowhood: And he directs that at her death all his estate shall be sold and equally divided between all his surviving children and their heirs. The children living at the death of the testator took a vested interest in the estate.

Idem, 67

3. In 1799 testator lends to his son B a tract of land during his life; and if he should die without lawful issue testator gives the land to his grand son H, to him and his heirs forever. But should my son B leave lawful issue, my will is that he may dispose of said land to such of his issue as he may think fit. B took an estate tail in the land, which by the statute was converted into a fee.

Callis & als. v. Kemp & als., 73

4. Testator devises the whole residue of his real and personal estate to B and L, in trust, that his niece Ann shall have the whole profits during her life, for the support of herself and her son J. At her death the trust to cease, and the estate to go to J and his heirs, if he survived his mother; if he died before her, to his children, if he left any. If J dies before his mother without children, and she have other children and die, they to take the same estate which J would have taken if he had survived

her. But if Ann and J die without children to inherit the estate, then the estate to go to L and his heirs. Testator authorizes Ann to sell the land and slaves, if necessary for her comfort, with the approbation of B and L, and purchase other property, which is to be in the same situation, and descend in the same way as that left to Ann and her son J in the event of their death. Upon J's surviving his mother, he took the absolute fee; and there is no further limitation of the estate in that event.

Cheshire v. Purcell, 771

5. Testatrix gives to her husband a life estate in real and personal estate, to be used as he pleases in every respect. At his death, or before, if he chooses to relinquish his rights, she gives all the property to one or more of the children of R, as he may designate; or should it be necessary, he may make such other disposition of the same as he may deem proper, having full confidence in him that he will do what is right. R is the daughter of her husband by a former wife. The husband died in her life time. **Held:**

1st. The provision in favor of the children of R is void for uncertainty.

Robinsons v. Allen & als., 785

2d. The testatrix did not dispose of the remainder in the property, after the life estate given to the husband; and he having died in her life time, the property was not disposed of by her will, but passed to her heirs and next of kin.

Idem, 785

LIMITATIONS—Statute of.

1. See *Adversary Possession, passim*.

2. No time runs against the commonwealth.

Lecasser v. Washburn, 572

3. Though the statute had commenced to run against the true owner of land, yet upon a forfeiture under the delinquent land laws, it ceased to run until it was sold by the commissioner of delinquent lands.

Idem, 572

4. The statute cannot bar a legatee's claim to a specific legacy whilst it is held as such by the executor, though he had long since assented to the legacy.

Nelson's adm'r v. Cornwell, 724

5. A decree obtained against an absent defendant by fraud is not pro-

tested after seven years by the act, 1 Rev. Code 1819, p. 475, § 4.

Evans & als. v. Spurgin & als., 615
·6. See *Executors and Administrators*, No. 24, and

Braxton, adm'r, &c., v. Harrison's ex'ors, 30

7. The statute applies to a debt by parol contracted by a party then living in Virginia, but who soon thereafter removed from the state, and remained out of it until his death.

Markle's adm'r & als. v. Burch's adm'r, 26

8. Trust deed to secure a debt provides that the grantor shall retain the property until a certain time. Before that day he agrees to sell it at a certain price, and if the money and interest is not returned within twelve months, the agreement to stand as a bill of sale; and he delivers the property. Within five years from the time when the trustee might take the property, and from the end of the twelve months, but not from the date of the agreement, the trustee, who had no notice of the sale, takes possession of it and sells it to pay the debt. The title of the purchaser was not perfected by the lapse of time; and the trustee was entitled to take possession and sell under the trust deed.

Colvin v. Menzies, 87

9. A party takes possession of land, claiming it under a lost will; and he files a bill to set up the will, which is afterwards dismissed for want of security for costs. The statute having commenced to run, the pendency of this suit did not stop it.

Capehart & al. v. Gregory & als., 505

10. The statute runs against *femes covert* and their husbands, so as to bar a recovery during coverture.

Idem, 505

11. The infant children of a female heir, who died a *feme covert*, are barred after three years from the death of their mother, though they may continue infants all the time.

Idem, 505

12. Upon a bill by the other heirs for partition, against the party in possession, they are required to establish their title at law. If there was any equitable ground to repel the bar of the statute, the court, in directing them to establish their title

at law, should have given effect to it in its order: But this not having been done, the statute must have its legal effect on the trial at law.

Idem, 505

13. In 1831, and until the act of March 20th, 1837, no possession short of fifteen years, unaided by a descent cast, would bar an entry of one having title to land.

Kincheloe v. Tracewells, 587

MANDAMUS.

1. See *Free Negroes*, No. 3, and

Morris, Ex parte, 292

2. It seems that the County court will be compelled by *mandamus* to act upon an application for a license to keep a tavern; but will not be compelled to grant it.

Yeager, Ex parte, 655

MARRIAGE.

When a condition in restraint of marriage annexed to a legacy is void. See *Legacies and Legatees*, No. 12, 13, and

Maddox & al. v. Maddox's adm'r & als., 804

MISDEMEANOR.

1. The offence of a free negro in returning to the state is a misdemeanor.

Morris, Ex parte, 292

2. A free negro convicted of a misdemeanor is entitled to an appeal as of right.

Idem, 292

NEW TRIALS.

A comment of the judge upon the weight of the evidence in the cause, when excluding other evidence offered, being calculated to mislead the jury, the verdict should be set aside, and a new trial awarded.

McDowell's ex'or v. Crawford, 577

NOTICE.

1. What is a sufficient notice to the endorser, of the refusal of a drawee to accept a bill drawn in Virginia upon a merchant in London.

Stu. Inst. v. The Bank of Virginia, 290

2. When a tenant is not entitled to

notice to quit. See *Landlord and Tenant*, No. 2, 3, and

Harrison v. Middleton, 527

OLD POINT COMFORT.

1. How the conveyance by the state of Virginia to the United States, of the land at Old Point Comfort, is to be construed. See *Conveyances*, No. 1, 2, and

French v. Bankhead, 136

2. The land at Old Point Comfort had been appropriated by legislative enactments to the public use; and it was not, therefore, subject to be appropriated by individuals as waste and unappropriated lands, by entry and patent. *Idem*, 136

ORDINARIES.

1. The act, Code, ch. 96, § 3, p. 443, vests in the county courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they cannot be controlled by the circuit courts, either by *mandamus*, writ of error, or *certiorari*. *Yeager, Ex parte*, 655

2. Though the applicant for a license to keep a tavern may bring himself fully within and up to all that the statute requires, so that the County court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license as that the County court may be coerced to grant it. *Idem*, 655

3. It seems that the County court is bound to act upon every application for a license that is made to it; and if it refuses to act, the Circuit court will coerce it by *mandamus*. But when the County court does act, its judgment and discretion are not to be controlled. *Idem*, 655

PARCENERS.

One of two coparceners contracts to sell a small part of a tract of land, professing to act for both, though without authority; and the other par-cener does not consent to the sale. Both coparceners afterwards convey the whole tract to a grantee having full knowledge of the agreement. The land sold is but a small part

either in quantity or value of one moiety of the tract. The grantee will be compelled to perform the agreement. *McKee v. Barley*, 340

PAROL EVIDENCE.

1. In a case of a joint purchase of land by two, parol evidence is not admissible to prove an agreement between them for an unequal division of the land. *Jarrett v. Johnson*, 327

2. Parol evidence that the clerk of the drawee of a bill of exchange was authorized to refuse acceptance of the bill is admissible in an action by the holder against the endorser. *Stainback v. The Bank of Virginia*, 260

PARTIES.

1. The administrator is the proper party to revive a proceeding against the Upper Appomattox Company to recover damages for injuries sustained, the jury having assessed the damages and returned their report to the court. *Upper Appomattox Co. v. Hardings*, 1

2. Landlord who has made a contract under seal for the sale of land in the possession of his tenant is the proper party to recover possession, if the tenant refuses to surrender it. *Harrison v. Middleton*, 527

3. To a bill by widow for dower in land sold in husband's life time, the present owner is the only necessary defendant. *M. Blair v. Thompson & als.*, 441

PAYMENTS.

1. What payments in depreciated orders are good. *Kidwell v. The Baltimore & Ohio Railroad Co.*, 676

2. When payments in bonds good. *Findley's ex'ors v. Findley*, 434

PLEADINGS.

1. A demurrer to a bill against an absent defendant, for the failure to aver that an attachment had issued, cannot be sustained; because the statute in terms provides that this process may issue after the institution of the suit. *O'Brien & als. v. Stephens & als.*, 610

2. What pleas are bad in bar to a

scire facias to revive a judgment.
See *Scire Facias*, No. 4, 5, and
Richardson's adm'r v. Prince
George justices, 190
Poindexter's adm'r v. Samt, 190

POWERS.

Testator says: Having implicit confidence in my wife F, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said wife F with the right and title of all my property, both real and personal, to dispose of to each of my children in any way she may think right. By a subsequent clause it was provided that if F died without making a will, the children should have an equal share of his estate.
HELD:

1st. That F has an unlimited discretion as to the time and manner of distributing the property among the testator's children. She may distribute it, or any part of it, in her life time or at her death, by any instrument adapted to pass property of the kind which she distributes; and she may distribute to either child such kind of property as she may choose to give him or her.

Steele v. Lerisay & als., 454
2d. That F may sell and convey the whole or any part of the property, and distribute the proceeds of the sale.

Idem, 454
3d. That F having a discretion as to the time and manner of distribution, a purchaser of land from her is not bound to see to the application of the purchase money.

Idem, 454
4th. *Quere*: If each child is entitled to have ultimately an equal share of the estate.

POWER OF ATTORNEY.

See *Principal and Agent*, *passim*.

PRACTICE AT COMMON LAW.

1. Whether a plaintiff shall be permitted to introduce further evidence after the defendant's evidence is introduced, is a matter within the discretion of the court trying the cause, and its exercise will rarely, if ever, be controlled by an appellate court: Clearly he has a right to introduce

evidence to rebut that of the defendant.

Brooks v. Wilcox, 411
2. Though the defendant has announced that he is through with his parol evidence, yet, under the circumstances, the court should permit him to recall a witness for the plaintiff who had referred to the plaintiff's books, and to have them produced.

McDowell's ex'or v. Crawford, 378
3. If a deed of the defendant is introduced collaterally upon a trial as evidence, he may show that it is not his deed without making oath to the fact: And for this purpose he may introduce a subscribing witness to it, to prove that it was misread to the defendant.

Harrison v. Middleton, 527
4. The court may refuse to give an instruction, because it is so obscurely expressed as to leave in doubt the meaning intended.

Levasser v. Washburn, 573
5. The court should refuse to give an instruction where it is obscure and calculated to mislead the jury; or where it asks the court to decide upon a fact in issue in the cause; or where it is irrelevant or not applicable to the evidence.

Kincheloe v. Tracewells, 587
6. Upon a motion by the plaintiff to instruct the jury to disregard all the documentary evidence of the defendant, of which some parts are legal and other illegal, the court may properly overrule the motion, without undertaking to state to the jury which is legal and which is illegal.

Idem, 587
7. A comment of the judge upon the weight of the evidence in the cause, when excluding other evidence offered, being calculated to mislead the jury, is a ground for a new trial.

McDowell's ex'or v. Crawford, 378
8. It was not improper before the act, Code, p. 706, § 9, to render a judgment for costs in favor of a defendant against a person for whose benefit the suit was brought, when the defendant succeeded in the case.

Pates v. St. Clair, 23
9. A judgment being rendered by consent of parties, by their attorneys, is by the attorney of the party for whose benefit the suit was brought.

Idem, 22
10. How a witness may be per-

mitted to refresh his memory. See *Witness*, No. 4, 5, 6, and

Harrison v. Middleton, 527

11. How a witness's interest may be disproved. See *Witness*, No. 1, and

Idem, 527

12. What causes may be removed from a County to a Circuit court. See *Courts*, No. 1, 2, 3, and

Idem, 527

Kincheloe v. Tracewells, 587

13. When judgment should be for the defendant, notwithstanding the verdict. See *Jeofails*, No. 1, 2, and

Boyles' adm'r v. Oerby, 202

PRACTICE IN CHANCERY.

1. As to proceedings against absent debtors. See *Absent Debtors, passim*, and

O'Brien & als. v. Stephens & als., 610

2. An objection to the jurisdiction of the court in the case of an injunction to an execution may be taken at the hearing of the cause.

Beckley v. Palmer & al., 625

3. Bill by a joint purchaser of land for partition, claiming the larger portion of the land. Though plaintiff fails to make out this claim, yet the court may decree the partition according to the rights of the parties.

Jarrett v. Johnson, 327

4. Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue; but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*, and the plaintiff must prove his case as to both.

Johnston v. Zane's trustees & als., 552

5. Bill by heirs against one of them in possession, claiming title; and the court directs plaintiffs to establish their title at law. If there is any equitable grounds to repel the statute of limitations, it should be stated in the bill; and the court, in making the order for the trial of the title at law, should direct that the plaintiffs should have the benefit of this equity on the trial.

Caperton & al. v. Gregory & als.

lessee, 505

6. When an issue should not be di-

rected. See *Issues Out of Chancery*, No. 2, 3, and

Smith's adm'r v. Betty & others, 752

Same v. Thurman & others, 752

7. If upon the proofs the bill should have been dismissed when the issue was directed, though there is a verdict for the plaintiff, the bill should, notwithstanding, be dismissed at the hearing. *Idem*, 752

8. Creditor qualifies as administrator on his debtor's estate, and, after exhausting the personal assets in payment of debts, is still a creditor. In a suit by the heirs in the County court the land is sold; and the administrator files a bill in the Circuit court to enjoin the payment of the purchase money to the heirs, and asks to have it applied to his debt. **HELD:**

1st. He is entitled to have the proceeds of the land applied to pay his debt.

Williams v. Williams & als., 95

2d. The injunction should only go to restrain the payment of the purchase money to the heirs, and should not restrain the collection of it by the County court. *Idem*, 95

3d. Although it would have been more regular for the administrator to connect himself, by petition or bill, with the proceedings in the County court, in which the fund had been realized, yet there is no serious objection to the mode adopted by him. The County court, instead of directing the money to be paid to the heirs, may direct it to be paid to such person as the Circuit court may appoint to receive it; or one of the suits may be removed to the court in which the other is pending. *Idem*, 95

9. When there may be a decree for a specific performance without directing a conveyance.

Bailey v. James, 468

PRINCIPAL AND AGENT.

1. A power of attorney to draw, endorse and accept bills, and to make and endorse notes negotiable at a particular bank, in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal:

And an endorsement of a bill by the agent, in the name of his principal, for the benefit of the agent, is beyond his authority, and does not bind the principal.

Stainback v. The Bank of Virginia, 269
Same v. Read & Co., 281

2. A party dealing with the agent, with knowledge, or means of knowledge, that under such a power he is endorsing the name of his principal for his own benefit, is not entitled to recover from the principal.

Idem, 269, 281

3. The facts that the attorney, who was the drawer of a bill upon which he endorsed the name of his principal, held the bill at the time it was discounted by the holder, and that the proceeds were passed to his credit, are of themselves full proof that the attorney was acting for his own benefit, and not that of his principal.

Idem, 269

4. A power of attorney to draw, endorse and accept bills, and to make and endorse notes negotiable at a particular bank, in the name of the principal, does not authorize the attorney to draw a bill in the joint names of himself and his principal.

Stainback v. Read & Co., 281

5. Such a power does not authorize the attorney to draw a bill in the name of his principal for the benefit of the attorney; and a party dealing with the attorney, and having the means of knowing that the agent was exceeding his powers in thus drawing the bill for his benefit, cannot recover of the principal.

Idem, 281

6. What declarations of an agent in procuring a deed are admissible, and what inadmissible, against his principal. See *Enclosure*, No. 11, 12, and

Smith's estate v. Barry & others, 752
Same v. Thurman & others, 752

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. The notarial protest of a foreign bill of exchange states that the notary took the bill to the counting-house of the drawee, and there exhibited it to a clerk of the drawee, and demanded acceptance thereof; and that the said clerk replied that the same could not be accepted.

The protest is sufficient to bind the endorser.

Stainback v. The Bank of Virginia, 269

2. Parol evidence that the clerk was authorized to refuse acceptance of a bill is admissible in an action by the holder against the endorser.

Idem, 269

3. What is a sufficient notice of the refusal of the drawee to accept a bill drawn in Virginia upon a house in London.

Idem, 269

4. A note made in a particular country is to be deemed a note governed by the laws of that country, whether it is payable there or it is payable generally, without naming any particular place.

Wilson v. Lazier & als., 477

5. The possession of a negotiable instrument is *prima facie* evidence that the holder took it for value, and that he came to it honestly.

Idem, 477

6. A total failure of the consideration of a negotiable note does not impose on the innocent holder the *onus* of proving that he gave value for it.

Idem, 477

7. If the evidence raises a suspicion of fraud in the procurement of the note, then the holder is bound to prove that he gave value for it.

Idem, 477

8. There having been a total failure of consideration of a negotiable note, and the payee having endorsed it as a gift to a third person, who endorsed it for value; though the maker is compelled to pay it to the holder for value, he is entitled to recover from the payee, and if he is unable to pay it, from the endorser, the amount he received for it: And upon a bill against all the parties he will be relieved.

Idem, 477

9. A note does not import a debt existing previous to the period of its execution; but its effect is to give the debt and the note a contemporaneous origin.

Johnston v. Zane's trustees & als., 352

10. See *Principal and Agent*, *passim*.

PROTESTS.

When protest sufficient. See *Promissory Notes and Bills of Exchange*, No. 1, and

Stainback v. The Bank of Virginia, 269

PUBLIC WORKS.

See *Contracts*, No. 5, 6, 7, 8, and
Kidwell v. The Baltimore & Ohio
Railroad Co., 676

RECEIPTS.

See *Evidence*, No. 5, and
B. Staton v. Pittman, sheriff, 99
Pittman, sheriff, v. R. Staton, 99

RECORDS.

See *Evidence*, No. 9, and
Nelson's adm'r v. Cornwell, 724

REGISTRY OF DEEDS.

1. A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.

Johnston & wife v. Slater & al., 321

2. A deed admitted to record upon proof by subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded.

Idem, 321

REMOVAL OF CAUSES.

What causes may be removed from the County to the Circuit courts, after being pending one year. See *Courts*, No. 1, 2, and

Harrison v. Middleton, 527
Kincheloe v. Tracewells, 587

RENTS.

1. A landlord having distrained for rent in arrear, reserved in salt, has the affidavit and warrant of distress returned to the Circuit court; and the defendant appears there, and a jury is impaneled to ascertain the value of the rent in arrear, which, not being able to agree, is discharged; and the landlord dismisses the case in that court. He may then apply to the County court to have the value of the rent ascertained, basing his application on the same affidavit and warrant of distress.

Brooks v. Wilcox, 411

2. If the officer levying the distress thinks that he has not taken sufficient effects, he may make a second levy.

Idem, 411

3. The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascertain the rent said to be due.

Idem, 411

4. The only object of the proceeding before a jury in the case of a distress for rent is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a warrant has been levied for rent reserved in something other than money, and that it is due and in arrear.

Idem, 411

5. The jury having ascertained the value of the rent in arrear, the court made an order directing the officer to sell the property distrained as directed by law, and after satisfying the rent due, with interest and costs, to pay over the balance to the tenant. This is substantially in accordance with the statute.

Idem, 411

6. Under the act of March 2d, 1827, the landlord was entitled to interest on rent in arrear from the time it was due.

Idem, 411

RESCISSION OF CONTRACTS.

1. See *Vendor and Purchaser*, No. 5, 6, and *Bailey v. James*, 468

SCIRE FACIAS.

1. Judgment is recovered by justices for the benefit of the marshal of the W. Chancery court. The defendant being dead, the *scire facias* to revive the judgment recites it correctly, and adds, which marshal was W. This is no variance.

Richardson's adm'r v. Prince

George justices, 190

Poindexter's adm'r v. Same, 190

2. The marshal being dead, the *scire facias* recites that it was awarded at the instance of M, his administrator. It was not necessary to recite at whose instance it was awarded; and the recital is therefore surplusage, and does not vitiate the *scire facias*.

Idem, 190

3. It not appearing from the *scire facias*, the record, or the defendant's plea, that the foundation of the

judgment was a bond, requiring a relator in the action, it must be regarded as a common law liability, subject to be sued on in the name of the obligers without a relator; and whether W was marshal, or M was his administrator, is a question in which the defendant has no interest, and it cannot be raised by him by plea in bar to the plaintiffs' claim.

Idem, 190

4. The *scire facias* stated that the judgment had been suspended by injunction. This was unnecessary, and may be regarded as surplusage; and a plea in bar that the judgment had not been suspended by injunction offered no bar to the *scire facias*.

Idem, 190

5. The *scire facias* further stated that the injunction had been dissolved. A plea that it had not been dissolved is bad, and an issue made up upon it is immaterial. Therefore, though improper evidence upon it is admitted, it is no cause for reversing the judgment.

Idem, 190

6. The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either the plaintiff or defendant; and the injunction operates upon the revived judgment on the *scire facias*, to restrain and prohibit the issue of an execution thereon.

Idem, 190

SETTLEMENTS.

See *Trusts and Trustees*, No. 5, 6, and
Johnston v. Zane's trustees & als., 552

SHERIFFS.

See *Insolvent Debtors*.

SLAVES.

1. The fact that slaves are on the premises of a person who makes no claim to them, his infant daughter, who claims them, living with him, will not sustain an action of detinue against him for the slaves, by a party entitled to them.

B. Staton v. Pittman, sheriff, 99
Pittman, sheriff, v. R. Staton, 99

2. A conveyance of land and slaves, upon a trust to permit the slaves to live upon the land and take the pro-

fits of the land and their own labor to their own use, they still continuing to be slaves, is null and void, and passes nothing.

Smith's adm'r v. Betty & others, 752
Same v. Thurman & others, 752

SPECIFIC PERFORMANCE.

1. See *Parceners*.

2. A vendor having but an equitable title, and only selling his interest in the property, without warranty, and authorizing the vendee to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him.

Bailey v. James, 458

STATUTES.

1. The act, Code, ch. 122, § 4, p. 516, in relation to the attestation of wills, construed in *Parramore v. Taylor*, 220

2. The act, 1 Rev. Code 1819, ch. 128, § 103, p. 511, in relation to jeofails, construed in

Boyles' adm'r v. Overby, 202

3. The act, 1 Rev. Code 1819, ch. 113, § 13, p. 449, in relation to rents, construed in *Brooks v. Wilcox*, 411

4. The act of March 2d, Sess. Acts of 1827, ch. 27, § 3, p. 26, in relation to interest on rents, construed in

Idem, 411

5. The act of March 18th, 1841, Sess. Acts, p. 31, relinquishing commonwealth's right to forfeited lands, construed in

Levasser v. Washburn, 572

6. The act of March 28th, 1843, Sess. Acts, ch. 9, § 4, p. 17, in relation to the removal of causes, construed in

Harrison v. Middleton, 527

Kincheloe v. Tracewells, 587

7. The act of April 3d, 1852, Sess. Acts, ch. 95, § 1, p. 78, in relation to remedies against absent debtors, construed in

O'Brien & als. v. Stephens & als., 610

8. The act, 1 Rev. Code 1819, p. 475-6, § 4, in relation to decrees against absent defendants, construed in *Evans & als. v. Spurgin & als.*, 615

9. The act, Code, ch. 96, § 3, p. 443, in relation to ordinaries, construed in

Yeager, Ex parte, 655

10. The act, Code, ch. 38, § 18, p. 209, in relation to selling ardent

spirits, construed in *Head's Case*, 819
 11. The act, Code, ch. 181, § 5, p. 681, in relation to amendments, construed in *Powell's Case*, 822
 12. The act, Code, ch. 193, § 5, p. 733, in relation to forgeries, construed in *Idem*, 822

SUBSTITUTION.

1. See *Sureties*, No. 2, 3, 4, and *Hill v. Manser & al.*, 522
2. See *Executors and Administrators*, No. 21, and *Braxton, adm'r, &c., v. Harrison's ex'ors*, 30

SURETIES.

1. A guardian qualified in 1821. In 1825 he transfers a bond of his ward to a party wholly innocent of any participation in the guardian's fraud, in the payment of a debt. The ward comes of age in 1832, and takes no steps to obtain his estate from his guardian until 1840, when the guardian becomes insolvent. He then sues the sureties of the guardian, and recovers from them the amount due to him from his guardian. In all this time the sureties had done nothing to secure the faithful discharge of his duties by the guardian, or to compel him to pay over to the ward his estate on his coming of age. Even if the party who had received the bond from the guardian could be held responsible to the ward, he is not responsible to the sureties.

Hunter v. Lawrence's adm'r & al., 111
 2. A surety in a forthcoming bond is a surety for the debt; and when he pays it, as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt: And the judgment, for the benefit of the surety so paying, is not extinguished, but is transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired. *Hill v. Manser & al.*, 522

3. The surety in a forthcoming bond pays to the creditor a sum certain, on the execution issued on the bond against the principal and himself, and takes a receipt as for money paid by him. The evidence of pay-

ment afforded by the receipt will not be repelled by proof of loose declarations that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the right to be substituted to the rights and remedies of the creditor.

Idem, 522

4. The creditor having taken a deed of trust from the principal debtor to secure the debt, and the debtor having subsequently given another deed of trust upon the same and other property, to secure debts to a third party, one of which was for money loaned to pay a balance due on the judgment, of which this third party had notice, the surety in the forthcoming bond is entitled to have the property embraced in the first deed applied to satisfy the amount he has paid, with interest on so much thereof as went to discharge the principal of the debt; and if that property does not discharge it, to have the land embraced in the second deed subjected to discharge the balance.

Idem, 522

SURPLUSAGE.

1. What will be deemed surplusage. See *Scire Facias*, No. 2, 4, and *Richardson's adm'r v. Prince George justices*, 190

Poindexter's adm'r v. Same, 190

2. When a description of a defendant as administrator may be deemed surplusage. See *Executors and Administrators*, No. 5, and *Fitzhugh's ex'or v. G. F. Fitzhugh*, 300

SURVIVOR.

To what period the survivorship will relate. See *Limitation of Estates*, No. 1, and

Martin's adm'r, &c., v. Kirby, adm'r, &c., & als., 67

TAX SALES.

1. A party claiming title under a deed from a deputy sheriff, for land sold for nonpayment of taxes under the act of February 9th, 1814, must show that the person described as high sheriff was such, and the grantor in the deed was his deputy.

Hobbs v. Shumates, 516

2. Though such deed recites an insufficient advertisement of the pro-

perty conveyed, it is not thereby vitiated; but is valid to convey such title as by law the sheriff was authorized to convey. *Idem*, 516

TRUSTS AND TRUSTEES.

1. A court of equity will not, in general, assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion: Nor will a suit be entertained to compel a trustee to exercise his power.

Cochran v. Paris & als., 348

2. Testator gives his estate to his executors, for the benefit of his son, and, if and when they shall judge that it would be prudent to entrust him with it, to turn it over to him. The executors having declared their judgment that the son may be entrusted with the estate, equity will compel them to turn over the estate to him. And before it is done, the son has such an interest in the estate that it is subject to his debts. *Idem*, 348

3. Real estate is conveyed to secure debts. The grantor in the deed has at the time but an equitable title, but is entitled to call for the legal title. It is an abuse of his power by the trustee to sell the property before getting in the legal title.

Rossett v. Fisher & al., 492

4. The trustee having sold the property for one-fourth of its value, without getting in the legal title, and the principal creditor having become the purchaser, under the circumstances, equity will set aside the sale.

Idem, 492

5. A settlement which gives to the grantor a bare maintenance with his wife for life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after contracted debts.

Johnston v. Zane's trustees & als., 552

6. Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue; but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*, and the plaintiff must prove his case as to both.

Idem, 552

7. A conveyance of land and slaves, upon a trust to permit the slaves to live upon the land and take the profits of the land and of their own labor to their own use, they continuing to be slaves, is null and void, and passes nothing to the grantee or the slaves.

Smith's adm'r v. Betty & others, 752

Same v. Thurman & others, 752

8. Money lent by a bachelor uncle to his nephew, to secure which a deed of trust was executed, was held, under the circumstances, to have been given and released by the uncle to the nephew, so that a court of equity would refuse to enforce the trust at the suit of the executors of the uncle.

Fitzhugh's ex'ors v. Fitzhugh, 210

9. See *Conveyances—Fraudulent*.

UPPER APPOMATTOX COMPANY.

1. In a proceeding to recover damages against the company under § 9 of the act of February 23d, 1835, Sess. Acts, the jury having returned their report ascertaining the damages, and the company having excepted and obtained a continuance of the cause, the plaintiff dies. The proceeding may be revived by the administrator, but not by the heirs of the plaintiff.

Upper Appomattox Co. v. Hardings, 1

VARIANCE.

What is not a variance. See *Scire Facias*, No. 1, and

Richardson's adm'r v. Prince

George justices, 190

Poindexter's adm'r v. Same, 190

VENDOR AND PURCHASER.

1. Where there is a joint purchase of land by two, to whom it is conveyed, and who give their bond for the purchase money, in the absence of proof of any agreement to the contrary, they are entitled to the land in equal portions.

Jarrett v. Johnson, 327

2. One of the purchasers, having previously made a conditional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed this other should have a specified part of the land; but the contract was not

completed. This agreement between the purchasers was then at an end, and cannot affect their rights under their joint purchase. *Idem*, 327

3. In such a case of a joint purchase, parol evidence is not admissible to prove an agreement between them for an unequal division of the land. *Idem*, 327

4. In such a case the purchaser claiming to be entitled, under an agreement between them, to the largest portion of the land, files a bill for specific performance of the agreement, and for partition accordingly: Though he fails to prove the agreement, the court may go on to make partition according to the legal rights of the parties. *Idem*, 327

5. Where the contract for the sale of land is entire, for a specific sum of money, and the title to a part of the land fails from a cause of which both vendor and vendee were ignorant, it is ground for the rescission of the whole contract; but the purchaser cannot insist upon a partial rescission. *Bailey v. James*, 468

6. In such a case, if the purchaser declines to rescind the contract, he must pay the whole purchase money. *Idem*, 468

7. Upon a bond to pay the purchase money of land, with a provision that upon the purchaser's failure to get the legal title from a third party the contract of sale shall be void, the purchaser having been let into possession and continuing to hold, and himself neglecting to get in the title, he shall pay interest. *Idem*, 468

8. The vendor having but an equitable title, and only selling his interest in the property, without warranty, and authorizing the purchaser to proceed to get in the legal title, it is not error to decree a specific execution of the contract at the suit of the vendor, without directing a conveyance by him. *Idem*, 468

9. When purchaser not bound to see to the application of the purchase money. See *Powers*, No. 1, and *Steele v. Levisay & als.*, 454

VERDICT.

1. In ejectment the jury set out the wills of a grandfather and father; and if the son, who is dead, took un-

der the father's will, they find for the plaintiffs: If he took under the will of the grandfather, they find for the defendants. The verdict is sufficiently certain; and submits the single question upon the construction of the wills to the court.

Callis & als. v. Kemp & als., 78

2. See *Ejectment*, No. 4, 5, and

Idem, 78

WASTE AND UNAPPROPRIATED LANDS.

1. The land at Old Point Comfort had been appropriated to the public use, and was not waste and unappropriated lands, which might be appropriated by entry and patent.

French v. Bankhead, 136

2. How an entry of waste and unappropriated land must be made. See *Entry of Land*, *passim*, and

McNeel v. Herold, 309

3. A patent for land forfeited to the commonwealth passes nothing.

Levasser v. Washburn, 572

WILLS.

1. What does not constitute incapacity in a testator.

Parramore v. Taylor, 220

2. What is not an improper influence which will invalidate a will.

Idem, 220

3. The Code, ch. 122, § 4, p. 516, in relation to the attestation of wills, does not require that the witnesses shall subscribe their names in the presence of each other. *Idem*, 220

4. T subscribes his name to his will in the presence of C, and requests C to attest it, who does so. B is then called into the room, and T again acknowledges the paper as his will, and requests B to attest it, who does so, C being present when T acknowledges the paper to B, but not subscribing it, and not recognizing his subscription at that time; the whole, however, being done within a few minutes. The will is duly attested. *Idem*, 220

5. In construing a provision in a will, the whole instrument is to be looked to, to ascertain the intention of the testator.

Cheshire v. Purcell, 771

6. In construing a will, if the language be popular and ordinary, its

meaning is to be construed according to its usual acceptation; if technical legal terms are used, they are to be construed in the sense which the law affixes to them.

Robinsons v. Allen & others., 785

7. A will, appearing upon its face to have been made by a married woman, if it has been regularly admitted to probat in the proper court, its validity cannot be questioned in a collateral suit. *Idem*, 785

8. See *Limitation of Estates*, *passim*.

WITNESS.

1. A witness is called, who is objected to as being interested, and proof *aliunde* of his interest is introduced. He is then examined on his *voir dire* by the party calling him, to show that he has no interest, and this is objected to by the other party; but before he is sworn in chief a deed is produced which shows he has no interest. If it was error to examine him on his *voir dire*, it was cured by the proof of his want of interest before he was sworn in chief.

Harrison v. Middleton, 527

2. Slaves are bequeathed to one for life, and on his dying without heirs, over to another. In a controversy between the contingent legatee and a purchaser under the legatee for life, who was one of two executors, the other executor is a competent witness for the contingent legatee, to prove the assent of the executors to the legacy for life.

Frazer's adm'r v. Bevill & als., 9

3. A husband is not a competent subscribing witness to a deed executed during the marriage, by which

real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.

Johnston & wife v. Slater & al., 321

4. A witness may refresh his memory by reference to a paper, whether an original or a copy, and whether written by himself or another; but he must then speak from his own recollection thus refreshed. *Harrison v. Middleton*, 527

5. But a surveyor who made a survey from a diagram handed him by the plaintiff, and which he has in court, may refer to the courses and distances on the diagram, though he may not be able to remember them independent of it. The diagram is itself evidence, and he may point out on it the lines he ran. *Idem*, ..

6. An extract or copy from his field notes, taken by a surveyor, is not evidence; and he can only use it to refresh his memory; and must then speak from his recollection.

Idem, 527

WRIT OF RIGHT.

1. See *Adversary Possession*, No. 1, 2, 3, 4, and

Koiner v. Rankin's heirs, 420

2. The quantity and boundaries of the land described in the count, and in the verdict, vary from each other; but the verdict finds that the land therein described is the tenement mentioned in the count. It is to be presumed that the description given in the count is a mistaken description, and that the land recovered is the land demanded.

Idem, 420

